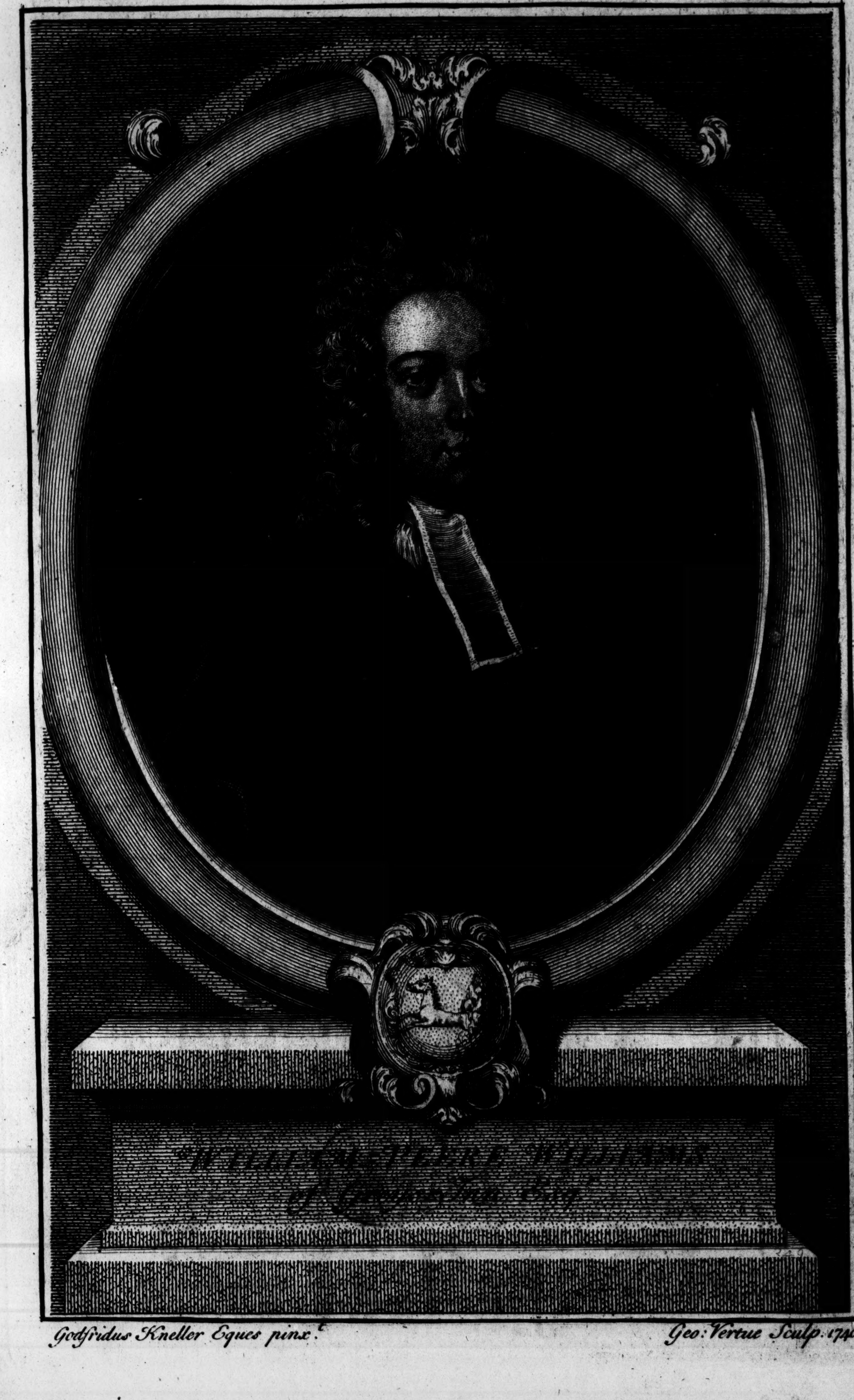
WE all knowing the great Learning and Ability of the Author do allow and approve of the Printing and Publiſhing the REPORTS of *William Peere Williams*, late of *Gray's Inn*, Eſq;

June 24.
1740.

Hardwicke C.
W. Lee,
J. Verney,
J. Willes,
J. Comyns,
F. Page,
Law. Carter,
E. Probyn,
J. Forteſcue A.
W. Forteſcue,
W. Chapple,
T. Parker,
M. Wright,
Ja. Reynolds.

G.R III.


WILLIAM PEERE WILLIAMS
of Grays Inn Esq.

Godfridus Kneller Eques pinx.ᵗ Geo: Vertue Sculp. 1740.

21 d 13

REPORTS
OF
CASES
ARGUED and DETERMINED
IN THE
High Court of Chancery,
AND
Of ſome ſpecial CASES
Adjudged in the Court of *KING's BENCH*:

Collected by
William Peere Williams,
Late of *Gray's Inn*, Eſq;

In Two Volumes.

VOL. I.

Publiſhed with NOTES and REFERENCES, and Two TABLES
to each VOLUME; one of the NAMES of the CASES,
the other of the PRINCIPAL MATTERS:
By his Son *William Peere Williams*, of the *Inner Temple*, Eſq;

The Second Edition corrected, with additional References.

In the SAVOY:
Printed by HENRY LINTOT (Aſſignee of *Edw. Sayer*, Eſq;)
for T. Oſborne in *Gray's Inn*. MDCCXLVI.

BRITISH MUSEUM

To the Right Honourable

The Lord *HARDWICKE*,

Lord High Chancellor of GREAT BRITAIN.

MY LORD,

I Here preſume, under your Lordſhip's Patronage, to offer to the Publick the following REPORTS, which might have appeared with more Advantage, had the Author lived to put them to the Preſs: But your Lordſhip will, I hope, be the more readily induced to pardon this Addreſs, that the Great Name and Reputation of the Patron may protect the Work from the Cenſure to which it would otherwiſe be expoſed.

I know your Lordſhip's Sentiments, and the Value of your Time too well, to attempt a long Diſcourſe in the uſual Stile of Dedications: Give me Leave therefore only to add, that how Great ſoever the Number may be of thoſe who profeſs to Reſpect and Honour you, there is not one that does ſo with more Sincerity than,

My Lord,

Your Lordſhip's

Moſt Obedient

Humble Servant.

William Peere Williams.

A TABLE OF THE NAMES of the CASES TO THE Firſt VOLUME,

Alphabetically diſpoſed, in ſuch a double Order, as that the CASES may be found by the Names either of the Plaintiffs or Defendants.

N. B. Where *verſus* follows the Firſt Name, it is that of the Plaintiff; where *and*, it is the Name of the Defendant.

A

Acherly *v.* Vernon. *Page* 783
All Souls College *v.* Coddrington. 597
Ambroſe *v.* Ambroſe. 321
Angleſea (Earl of) *and* Phipps. 696
Anonymus 267, 300, 301, 327, 411, 476, 495, 522, 523, 535, 648
Aſhton *and* Trafford. *Page* 415
Attorney General *v.* Mayor of Coventry. 306
  v. The Brewers Company. 376
  v. Wyburgh *&* *al'.* 599
  v. Grant. 669
  v. Hudſon. 674
  v. Sutton, *&c.* 754
Auſtin *and* Tate. 264

A Table of the Names of the CASES.

B.

Babington *v.* Greenwood. *Page* 530
Bacon *v.* Clerk. 478
Bagot *v.* Oughton. 347
Bagwell *v.* Dry. 700
Balch *v.* Waſtal. 445
Ball *and* Watts. 108
Bale *v.* Coleman. 142
Bamfield *v.* Popham. 54
Barker *and* Blunden. 634
Barkham *and* Brown. 652
Barrington (Sir John) *and* Shales. 481
Barnadiſton *and* Carter. 595
Baſſet *v.* Clapham. 358
Baugh *v.* Holloway. 557
Beale *v.* Beale. 244
Beaufort (Duke of) *v.* Berty. 703
Beaufort (Ducheſs of) *and* Lady Dowager Granville. 114
Beaumont *and* Darbiſon, on the Demiſe of Long. 229
Beckley & Newland *v.* ——— 92
Beck *v.* Rebow. 94
Benger *v.* Drew. 781
Benſon *and* Turton. 496
Benſon *v.* Benſon. 130
Berty *and* Duke of Beaufort. 703
Bewdley (Ballivi & Burgenſes) *&* Regina. 207
Bindon (Lord) *v.* Earl of Suffolk. 96
Birt *and* Clifton. 678
Blackborough *v.* Davis. 41
Blackborn *v.* Hewer Edgely. 600
Blandy *v.* Widmore. 324
Blunden *v.* Barker. 634
Bothomly *v.* Lord Fairfax. 334
Boſvil *v.* Brander. 458
Bowers *v.* Littlewood. 594
Brewers Company *and* Attorney General. 376
Brockman *v.* Honywood. 328
Broderick *v.* Broderick. *Page* 239
Brooks *and* Starkey. 390
Brown *v.* Litton. 140
Brown *v.* Barkham. 652
Bullas *and* Watts. 60
Burdet (Sir Robert) *v.* Hopegood. 486
Burlington (Counteſs of) and Car. 228
Burrard *and* The King. 435
Burnet *v.* Theobald. 609
Burridge *v.* Bradyl. 127
Butler *v.* Duncomb. 448

C.

Cain and Jeffs *and* Fountain. 504
Can *v.* Can. 567
Can *v.* Can. 723
Car. *v.* Counteſs of Burlington. 228
Carew *and* Philips. 117
Carter *v.* Barnadiſton. 505
Chancey's Caſe. 408
Chaplin *v.* Horner. 483
Chapman *and* Forth. 663
Chaſe *and* Lewis. 620
Chewton (the Hundred of) *and* Price. 437
Cheyney (Lord) *and* Pierpoint, 488
Ckild (Sir Cæsar) *v.* Frederick. 266
Chriſtian *v.* Corren. 329
Church *and* Throgmorton. 685
Churchill *v.* Lady Hobſon. 241
Clagget *and* Saunderſon. 657
Clapham *and* Baſſet. 358
Clarendon (Earl of) *v.* Hornby. 446
Clements *v.* Scudamore. 63
Clerk *and* Bacon. 478
Clifton *v.* Birt. 678
Coatſworth *and* Dalſton. 731
Coddrington *and* All Souls College. 597
Colcheſter (Mayor and Aldermen of) *v.* ——— 595

A Table of the Names of the CASES.

Coleman *and* Bale. *Page* 142
Coleman *v.* Winch. 775
Collins *v.* Plummer. 104
Comber's Caſe. 766
Cook *v.* Oakley. 302
Cook *and* Idle. 70
Copeland *v.* Stanton. 414
Copeman *v.* Gallant. 314
Copley *v.* Copley. 147
Corren *and* Chriſtian. 329
Cottle *and* Young. 101
Coventry (Mayor of) *and* Attorney General. 306
Cox's Caſe. 29
Cud *v.* Rutter. 570

D.

Dagley *v.* Tolferry. 285
Dalſton *v.* Coatſworth. 731
Danvers *and* Waring. 295
Darbiſon, on the Demiſe of Long, *and* Beaumont. 229
Davenport *and* Elliot. 83
Davis's (Doctor) Caſe. 698
Davis *and* Blackborough. 41
Day *v.* Trigg. 286
Dedire *and* Freemoult. 429
Devon (Duke of) *and* Metham. 529
Dighton *and* Tomlinſon. 149
Diſher *v.* Diſher. 204
Done's Caſe. 263
Dowgat *and* Dean and Chapter of Dublin. 348
Dowler *and* Higgins. 98
Drake *v.* Robinſon. 443
Drew *and* Benger. 781
Drury *v.* Smith. 404
Dry *and* Bagwel. 700
Dublin (Dean and Chapter of) *v.* Dowgat. 348
Dullidge Hoſpital *and* Taylor. 655
Duncombe *and* Butler. 448
Dyoſe *v.* Dyoſe. 305

E.

Eakins *v.* Eaſt India Company. *Page* 395
Edgeley (Hewer) *and* Blackborn. 600
Elkin *and* Pinbury. 563
Elliot *v.* Davenport. 83
Elſe *v.* Osborn. 387
Evans *and* Marſh. 668
Eyre *and* Longford. 740

F.

Fairfax (Lord) *and* Bothomly. 334
Farnandez *and* Vincent. 524
Farrington *v.* Knightley. 544
Fawks *v.* Pratt. 593
Fellows *v.* Mitchell & Owen. 81
Finch *v.* Earl of Winchelſea. 277
Fiſher *v.* Wigg. 14
Fletcher *and* Vane. 352
Foley *and* Winnington. 536
Forth *and* Chapman. 663
Fountain *v.* Cain & Jeffs. 504
Floyer *v.* Lavington. 268
Frederick *and* Sir Cæſar Child. 266
Frederick *v.* Frederick. 710
Freemoult *v.* Dedire. 429

G.

Gallant *and* Copeman. 314
Gaunt *and* Target. 432
Gawler *v.* Wade. 99
Gilham *and* Naldred. 577
Gillet *v.* Wray. 284
Goodright *v.* Wright. 397
Gordon *and* Grantham. 612
Goſs *v.* Tracey. 287
Grantham *v.* Gordon. 612

Grant

A Table of the Names of the CASES.

Grant *and* Att. General. *Page* 669
Granville (Lady) *v.* Ducheſs of Beaufort. 114
Greenwood *and* Babington. 530
Griffiths *and* Twiſleton. 310

H.

Halſey *and* Upwell. 651
Hamilton (Duke of) *v.* Lord Mohun. 118
Harris *v.* Lee. 482
Harper *and* Jenner. 247
Hartop *and* Whitmore. 681
Harvey *v.* Harvey. 125
Hawkins *v.* Holmes. 770
Hayter *v.* Rod. 360
Heath *v.* Percival. 682
Herbert *v.* Dean and Chapter of Weſtminſter. 773
Herne *v.* Meyrick. 201
Hewet *v.* Ireland. 426
Higgins *v.* Dowler. 98
Hinton *v.* Pinke. 539
Hobſon (Lady) *and* Churchill. 241
Holditch *v.* Miſt. 695
Hollingſhead's Caſe. 742
Holloway *and* Baugh. 557
Holmes *and* Hawkins. 770
Honor *v.* Honor. 123
Honywood *and* Brockman. 328
Hopegood *and* Sir Rob. Burdet. 486
Hooper *and* Nicholls. 198
Horner *and* Chaplin. 483
Howel *v.* Price. 291
Hudſon *and* Attorney General. 674
Humberſton *v.* Humberſton. 332
Humphreys *v.* Ingledon. 752
Hughes *v.* Sayer. 534
Hyde *v.* Parrat. 1

I.

Jago *and* Seeley. 389
Jacobſon *v.* Williams. 382
James *Ex parte.* *Page* 610
Idle *v.* Cook. 70
Jenner *v.* Harper. 247
Jenner *v.* Morgan. 392
Jenniſon (Sir Matthew) *v.* Lord Lexington. 555
Jennings *and* Nottingham. 23
Jekyl & Albone *and* Wind. 572
Jones *and* Lord Lanesboro'. 325
Ireland *and* Hewit. 426

K.

Kent (Duke of) & Fletcher *and* Orlebar. 737
Kentiſh *v.* Newman. 234
Knightley *and* Farrington. 544
Knight *and* Biſhop of Wincheſter. 406

L.

Lamplugh *v.* Lamplugh. 111
Lanesboro' (Lord) *v.* Jones. 325
Lavington *and* Floyer. 268
Lawſon *v.* Lawſon. 441
Lee *and* Harris. 482
Lec *Ex parte.* 782
Leigton *v.* Leighton. 671
Le-Fit *v.* Le-Bat. 526
Legate *v.* Sewel. 87
Lewis *v.* Chaſe. 620
Lexington (Lord) *and* Jenniſon. 555
Lingen *v.* Sowray. 172
Littlewood *and* Bowers. 594
Litton *v.* Litton. 541
Litton *and* Brown. 140
London (City of) *and* Stafford. 428
London (Biſhop of) *v.* Webb. 527
Longford *v.* Eyre. 740
Long *v.* Beaumont. 229
Long *v.* Short. 403

A Table of the Names of the CASES.

Loyd *v.* Read. *Page* 607
Lucas *and* Willis. 472

M.

Mackerneſs *Ex parte.* 260
Marlow *v.* Pitfield. 558
Marſh *v.* Evans. 668
Maſters *v.* Maſters. 421
Maxwell (Sir Geo.) *and* Lady Montacute. 618
Mead *and* Oneal. 693
Meers (Sir Thomas) *v.* Lord Stourton. 146
Metham *v.* Duke of Devon. 529
Meyrick *and* Herne. 201
Micklethwaite *and* Perkins. 274
Middleton *v.* Lord Onſlow. 768
Miles *v.* Williams. 249
Miſt *and* Holditch. 695
Mitchell & Owen *v.* Fellows. 81
Mitchell *v.* Reynolds. 181
Mocatta *v.* Murgatroyd. 393
Mohun (Lord) *and* Duke of Hamilton. 118
Montacute (Lady) *v.* Sir George Maxwell. 618
Morgan *and* Jenner. 392
Murgatroyd *and* Mocatta. 393

N.

Naldred *v.* Gilham. 577
Newland (Sir George) & Beckley *v.* ——— 92
Newman *and* Kentiſh. 234
Nichols *v.* Hooper. 198
Northey *v.* Strange. 340
Nottingham *v.* Jennings. 23
Nut *and* White. 61

O.

Oakley *and* Cook. *Page* 302
Oneal *and* Mead. 693
Onſlow (Lord) *and* Middleton. 768
Onions *v.* Tyrer. 343
Orlebar *v.* Fletcher & the Duke of Kent. 737
Osborn *and* Elſe. 387
Oughton *and* Bagot. 347
Owen & Mitchel *and* Fellows. 81

P.

Pain's Caſe. 439
Palgrave *and* Wingrave. 401
Parrat *and* Hyde. 1
Penrice *and* Lord Rockingham. 177
Percival *and* Heath. 682
Perkins *v.* Miclethwaite. 274
Petit *v.* Smith. 7
Pet's Caſe. 25
Philips *v.* Philips. 34
Philips *v.* Carew. 117
Phipps *v.* Earl of Angleſea. 696
Pierpoint *v.* Lord Cheney. 488
Pinbury *v.* Elkin. 563
Pinke *and* Hinton. 539
Pitfield *and* Marlow. 558
Plume *v.* Beale. 388
Pleydell *v.* Pleydell. 748
Plummer *and* Collins. 104
Pool *v.* Sacheverel. 675
Pollen *v.* Sir John Huband. 751
Popham *and* Bamfield. 54
Pooley *v.* Ray. 355
Powell *and* Rawlins. 297
Prat *and* Fawks. 593
Price *v.* The Hundred of Chewton. 437
Price *and* Howell. 291
Pye *and* Gorge. 128

A Table of the Names of the CASES.

Q.

Queensberry's (Duke of) *Caſe*. *Page* 582

R.

Ratcliff *v.* Roper. 420
Rawlins *v.* Powell. 297
Ray *and* Pooley. 355
Read *and* Loyd. 607
Rebow *and* Beck. 94
Regina *v.* Ballivos & Burgenſes de Bewdley. 207
Rex *v.* Burrard. 435
Reynolds *and* Mitchell. 181
Richardſon *v.* Spraag. 434
Richmond *v.* Tayleur. 734
Robinſon *and* Drake. 443
Rockingham (Lord) *v.* Penrice. 177
Rod *v.* Hayter. 360
Roper *and* Ratcliffe. 420
Rutter *and* Cud. 570

S.

Sacheverel *and* Pool. 675
Sandys *v.* Sandys. 707
Salkeld *Ex parte*. 560
Savile *v.* Savile. 745
Savile *v.* Blacket. 777
Saunderſon *v.* Clagget. 657
Sayer *and* Hughes. 534
Scudamore *and* Clements. 63
Seale *v.* Seale. 290
Seely *v.* Jago. 389
Sewell *and* Legate. 87
Shales *v.* Sir John Barrington. 481
Short *v.* Wood. 470
Short *and* Long. 403
Smith *and* Petit. 7
Smith *and* Drury. 404
Smith *Ex parte*. *Page* 237
Smith *and* Twaites. 10
Sowray *and* Lingen. 172
Spraag *and* Richardſon. 434
Squib *v.* Wyn. 378
Stafford *v.* City of London. 428
Stanton *and* Copeland. 414
Starkey *v.* Brooks. 390
Strange *and* Northey. 340
Stourton (Lord) *and* Sir Thomas Meers. 146
Story & Bell *and* Wood. 781
Suffolk (Earl of) *and* Earl of Thomond. 461
Suffolk (Earl of) *and* Earl of Bindon. 96
Sutton & Payman *and* The Attorney General. 754

T.

Target *v.* Gaunt. 432
Tate *v.* Auſtin. 264
Tayleur *and* Richmond. 734
Taylor *v.* Dullidge Hoſpital. 655
Theobald *and* Burnet. 609
Thomond (Earl) *v.* Earl of Suffolk. 461
Throgmorton *v.* Church. 685
Tipping *and* Tipping. 729
Tolferry *and* Dagley. 285
Tomlinſon *v.* Dighton. 149
Tracey *and* Goſs. 287
Trafford *v.* Aſhton. 415
Trevor *v.* Trevor. 622
Trig *and* Day. 286
Trot *v.* Dawſon. 780
Tucker *v.* Wilſon, Adminiſtrator of Thynn. 261
Turton *v.* Benſon. 496
Twaites *v.* Smith. 10
Twiſleton *v.* Griffith. 310
Tyrer *and* Onions. 343
Tiſſen *v.* Tiſſen. 500

A Table of the Names of the CASES.

V.

Vane *v.* Fletcher. *Page* 352
Vernon *and* Acherly. 783
Vincent *v.* Farnandez. 524
Upwell *v.* Halſey. 651

W.

Wade *and* Gawler. 99
Waring *v.* Danvers. 295
Waſtall *and* Balſh. 445
Watts *v.* Bullas. 60
Watts *v.* Ball. 108
Webb *and* Biſhop of London. 527
Webb *v.* Webb. 132
Wenman's (Lord) *Caſe.* 701
Weſtminſter (Dean and Chapter of) *and* Herbert. 773
Wheeler & Vernon *and* Acherley. 783
White *v.* Nutt. 61
Whitmore *and* Hartop. 681
Wiburgh *and* Attorney General. *Page* 599
Widmore *and* Blandy. 324
Wig *and* Fiſher. 14
Williams (Lady) *v.* Wray. 137
Williams *and* Jacobſon. 382
Williams *and* Miles. 249
Willis *v.* Lucas. 472
Wilſon *and* Tucker. 261
Wincheſter (Lord) *and* Finch. 277
Wincheſter (Biſhop of) *v.* Knight. 406
Winch *and* Coleman. 775
Wind *v.* Jekyl & Albone. 572
Wingrave *and* Palgrave. 401
Winnington *v.* Foley. 536
Wood *v.* Story & Bell. 781
Wood *and* Short. 470
Wray *and* Lady Williams. 137
Wray *and* Gillet. 284
Wright *and* Goodright. 397
Wyn *and* Squib. 378

Y.

Young *v.* Cottle. 101

ERRATUM.

Vol. I. Page 663. *Forth* verſus *Chapman* is miſplaced.

DE
Term. Paſchæ,
1695.

Hyde verſus *Parrat* & *al'*.

Caſe 1. *Lord Keeper* Sommers. 2 Vern. 331. *A.* deviſes Houſhold Goods to his Wife for Life, and afterwards to his Son. The Court allowed this a good Deviſe over; and to be the ſame as if the Deviſe had been only of the *Uſe* of the Goods to the Wife for Life.

ONE *Hyde* of *Hoddeſdon* (*in Com. Hertford*) by Will dated——*September* 1687, (*inter al'*) deviſed his Houſhold Goods in his dwelling Houſe at *Hoddeſdon* unto his Wife *Margaret Hyde* for her Life, and after her Death, to his Son *Joſeph Hyde*, and died, having made one *Parrat*, his Son in Law, Executor. The Son *Joſeph Hyde* brought his Bill in Equity againſt *Margaret Hyde* and *Parrat*, to have an Inventory of theſe Goods; and that *Margaret Hyde* ſhould give Security, that they, at the Time of her Death, ſhould be forth-coming to the Plaintiff, and not be imbeziled.

The Cauſe coming on to be heard before Baron *Powel*, he reſerved it for the Opinion of the Lord Keeper *Sommers*, whether this Deviſe over of the Goods was void? Whereupon the Cauſe was heard before the Lord Keeper, when the only Queſtion was, Whether this Deviſe of the Goods to one for Life, with Remainder over, was not void as to the Remainder, it not being by way of *Uſe*?

And I argued, that this Deviſe over was void; inſiſting, *Firſt*, upon the Reaſon of the Thing: *Secondly*, upon the Authorities in Point: And *Thirdly*, that if ſuch Deviſe over was void at Law, there was no Reaſon that Equity ſhould ſupport it, or, in this Caſe, vary from the Law. Even in the Caſe of a Chattel Real, where it has been deviſed to one for Life, the Remainder over, ſuch Remainder has formerly been held void, as in *Dyer* 74, and in *Child* and *Bayley*'s Caſe, *Cro. Jac.* 461. where it is ſaid by the Court, that if *Matthew Manning*'s Caſe (*a*) had been *Res integra*, the Conſtruction there made would hardly have prevailed: But ſince it had been adjudged, they would not diſturb it. Now there is not near ſo much Reaſon to ſupport a Deviſe of a perſonal Chattel to one for Life, with Remainder over, as there is to ſupport a Deviſe of a Chattel Real, made in that Manner: For, *Firſt*, Perſonal Chattels are liable to be loſt, ſtolen, or burnt: But Lands, or other Things, of which real Chattels conſiſt, are not ſubject to ſuch Caſualties; and therefore no Reaſon that the one ſhould endure ſo large a Limitation as the other.

(*a*) 8 Co. 94. b.

Secondly, Out of a Chattel real leſſer Eſtates or Intereſts may be derived; as Leſſee for Years may make a Leaſe at Will, or an under Leaſe for Years, and grant the Remainder or Reverſion over; but the Intereſt of a perſonal Chattel cannot be ſo divided; neither (ſtrictly ſpeaking) can a Man be ſaid to have an *Eſtate* in a perſonal Chattel; for that which is called an *Eſtate* in Lands and Tenements, is termed a *Property* (and not an Eſtate) in perſonal Chattels; the Law conſidering the firſt as permanent, the other as temporary and precarious. It is true, the Books ſay, If I

deviſe

deviſe the *Uſe* of a perſonal Chattel to one for Life, and after to another, this Deviſe over is good: But the ſame Books alſo ſay, that if the firſt Deviſe be of the Goods *themſelves* (as in the principal Caſe) the Deviſe over is void; and there ſeems to be ſome Reaſon, from the Rules of Law, to maintain that Diverſity; for where the Goods themſelves are deviſed to one for Life, and after to another, the Deviſe over, according to the Rules of Law, cannot take Effect; the Deviſe or Grant of a perſonal Thing to one for an Hour or Minute, being a Gift for ever, and an abſolute Diſpoſition of the intire Property to the firſt Perſon. But where the Deviſe is only of the *Uſe* of the Goods to one for Life, and after to another; here the firſt Deviſee has not the Property of the Goods, but only a ſpecial intereſt in them; and ſtill there remains a Property, which may be given over.

As for Authorities, there are as many upon this Point, as in any Caſe in the Law. In 37 *Hen.* 6. (abridged in *Bro. Deviſe* 13.) the Deviſe was, that *A.* ſhould *uſe* the Book called the *Graile* for his Life, and that afterwards *B.* ſhould uſe it; and it was agreed that the Deviſe over was good; the firſt Deviſe being of the *Uſe* only; but (ſays the Book) if the firſt Deviſe had been of the *Thing itſelf* to one for Life, and after to another, then the Deviſe over had been void; and the Lord C. J. *Brook* does ſo much approve of this Diſtinction, as in his Abridgment of the Caſe to call it, *valdè bone Diverſitie:* And the ſame Caſe is cited by the Lord C. J. *Popham.* In *Plowd.* 521, 522. (*Weldon* verſus *Elkington*) and in 33 *Hen.* 8. (as appears in *Brook*'s *New Caſes, ſect.* 334.) the ſame Difference is taken; and ſo in 2 *Ed.* 6. *Brook's New Caſes, ſect.* 388. In *Owen* 33. (7 *Eliz.*) this Diverſity is taken betwixt the Deviſe of the *Uſe* of the Thing, and of the Thing it ſelf, and ſo far prevailed, that the Lord *Fitz-James*, who was

Chief Juſtice of *England*, did by his Will deviſe the *Uſe* of his Jewels and Plate to *Nicholas Fitz-James* and the Heirs Male of his Body, (which might indeed be ſtraining it ſomewhat too far,) yet in that Caſe, the Lord *Dyer* and the Court held, that *Nicholas Fitz-James*, the Deviſee, had no Property in the Jewels or Plate. In 1 *Roll's Abr.* 610. (5 *Jac.* 1.) it is agreed *per Curiam*, that in Caſe of a Deviſe of a perſonal Chattel to one for Life, the Remainder over, this Deviſe over is void. In *Cro. Car.* 346. (9 *Car.* 1.) *Lord Haſtings* verſus *Sir Archibald Douglas*, the ſame Diſtinction is made betwixt the Deviſe of the Uſe of a perſonal Chattel to one for Life, the Remainder over, and the Deviſe of the Thing itſelf. In *March* 106. (17 *Car.* 1.) there is the ſame Caſe with this in all its Circumſtances: Certain Goods were deviſed to *A.* for Life, the Remainder over, and (as in the principal Caſe) the Deviſee over brought his Bill in Equity to compel the Deviſee for Life to give Security, that theſe Goods, upon the Death of the Deviſee for Life, ſhould come to the Plaintiff: And this Bill was brought in the Court of Equity of the *Marches of Wales*; but the Court of *C. B.* granted a Prohibition, reſolving the Deviſe over to be void, and making the ſame Diſtinction betwixt the Deviſe of Goods themſelves and the Uſe of the Goods; and this, ſays the Book, was done upon Conſideration.

Wherefore if the Law be ſo, that the Deviſe over of the Goods, in the principal Caſe, is void (as is fully proved by the Judgments and Opinions of many Judges, in many ſucceſſive Reigns) then the only remaining Queſtion is, whether Equity will in this Caſe interpoſe in Favour of the Deviſee over, and in Prejudice to the firſt Deviſee, ſo as to take from him the abſolute Property which the Law gives him? Now it is a ſettled Rule in Equity, that where there is no Purchaſor or Creditor in the Caſe, but both Parties concerned are Volunteers (as both the Deviſees are in this Caſe) Equity will not hurt, nor prevent either of them from enjoying that Advantage which he has at Law; and this is the Foundation upon which many ſolemn Decrees have been made. Whereas it cannot on the other Hand be pretended to have been ſettled in Equity, that ſuch Deviſe over is good; though perhaps there may have been ſome Decrees to that Purpoſe which have paſſed *ſub ſilentio:* But the laſt Caſe of this Nature was that of the Ducheſs of *Albemarle* (*a*) upon the late Duke of *Albemarle*'s Deviſe of his Jewels and Plate; which Point the Court did not reſolve but left as a Doubt. And ſo I concluded that the Deviſe over was void. (*a*) 2 Vern. 245.

Sir *Thomas Powis econtra* cited ſome Precedents where it had been determined in Favour of ſuch Deviſe over of perſonal Goods; particularly the Caſe of *Vachel* and *Vachel* (*b*) decreed in this Court*; adding, (*b*) Caſes in Chan. 129. that

---

* The other Precedents cited by the Counſel for the Plaintiff on this Occaſion were firſt the Caſe of *Catchmay* verſus *Nicholls*, *Morgan & al'*, heard firſt at the Rolls in *July* 26 *Car*. 2. and in the *October* following before the Lord Keeper *Finch*, where *Anne Catchmay* by her Will dated *Auguſt* 1662 made her Siſter *Catharine Catchmay* Executrix, and bequeathed her whole Eſtate (conſiſting of perſonal Things) to her, for and during the Term of her natural Life, and after her Deceaſe her Will was, that (*inter al'*) the Sum of 400 *l*. ſhould be given to the Daughters of *Chriſtopher Catchmay*, being the Plaintiffs, and Nieces to the Teſtatrix, by equal Portions, and if the ſaid *Catharine* ſhould die before the Children ſhould come of Age, then the ſaid 400 *l*. to be paid into the Hands of the Defendant *Morgan*, whom ſhe appointed to ſee her Will performed; *Catharine* died before the children came of Age, and left the Defendant *Judith*, Wife of the Defendant *Edward Nicholls*, Executrix; after which the Children of *Chriſtopher Catchmay* coming of Age, brought their Bill for their reſpective Shares of the 400 *l*. The Defendant's Counſel inſiſted, that this was a void Deviſe to the Plaintiffs, being the Remainder of a perſonal Thing after the Death of another, to whom the ſame was given before, and the Queſtion then ariſing on the Words of the Will, it was ordered that the Parties ſhould attend Mr. Juſtice *Ellis* with the ſaid Will, in order that he might peruſe the ſame, and deliver his Opinion on the Point aforeſaid; who certified his Opinion

that however it might have been determined, had this been the Caſe of a Grant, yet where the Thing paſſed by way of Deviſe or Truſt, the modern Practice had been to admit of a Limitation over after an Eſtate for Life, with Reſpect to perſonal Chattels.

The *Lord Keeper* took Time to conſider of it, and afterwards, on the Strength and Authority of the late Precedents, which had followed the Civil and Canon Laws, in conſtruing the *Uſe* of the Thing, and not the Thing it ſelf to paſs, where the firſt Deviſe is for a limited Time, in order the better to comply with the Intention of the Teſtator, allowed the Deviſe over to be good†.

Opinion, that the Plaintiffs ought to have Relief for the 400 *l.* Legacy given them by the ſaid Will. On the 27th of *July*, the Cauſe coming on again on the ſaid Certificate, *His Honour* ordered the Defendant *Nicholls* to pay to the Plaintiffs the ſaid 400 *l.* with Intereſt from the Time of the Bill. Afterwards the *Lord Keeper*, on an Appeal, though he differ'd from the *Maſter of the Rolls* as to the Manner of Relief, yet concurred with him, that the Plaintiffs ought to be relieved for the ſeveral Legacies given them by the Will, (and for which the ſaid *Catharine* was in Nature only of a Truſtee,) to be paid after her Death.

2*dly*, That of *Shirley & al'* verſus *Ferrers & al'*, heard the 28th of *May* 2 *Gul. & Mar.* which was thus:

John Ferrers Eſq; the Plaintiff *Anne*'s late Grandfather, being ſeiſed in Fee of the ſeveral Manors and Lands in the Bill mentioned, (*inter al'*) deviſed to the Defendant the Lady *Ferrers* for her Life, as an Addition to her Jointure, the Caſtle, Manor and Honour of *Tamworth*, and alſo *his Goods and Furniture* in *Tamworth* Caſtle, and by his ſaid Will deſired, that the Goods and Furniture might be preſerved for the Heir, ſo that the Children which ſhe had by the Plaintiff's Father might enjoy the ſame, appointing the ſaid Lady *Ferrers* Executrix. The Bill (*inter al'*) was to have the Goods and Furniture at *Tamworth* Caſtle inventoried and preſerved for the Plaintiff *Anne*; whereupon, as to the Goods and Furniture, it was ordered by the Lords Commiſſioners, that an Inventory thereof ſhould be taken and delivered to the Maſter by the Defendant, of which Goods, *&c.* ſhe to have the Uſe during her Life, after which they were to be delivered and remain to the Plaintiffs Uſe and Benefit.

† And thus it is now ſettled. *Vide poſt* the Caſes of *Tiſſen* verſus *Tiſſen* 502. and *Upwell* verſus *Halſey* 652.

DE
Term. S. Michaelis,
1695. *B. R.*

Petit verſus *Smith*.

Caſe 2.

Cumberb. 378.

Where an Executor has an expreſs Legacy, the Court of Chancery looks upon him as a Truſtee with regard to the Surplus, and will make him account, although the Spiritual Court has no ſuch Power.

A Man having a Daughter and two Brothers made his Will, and thereby gave 5 *l.* a-piece to his Brothers, appointing them Executors, but made no Diſpoſition of the Surplus.

On the Death of the Teſtator, the Daughter, as next of Kin, libelled in the Spiritual Court againſt the Executors, to have the Reſidue of the perſonal Eſtate; it appearing (as was ſuggeſted) by the expreſs Legacies given to the Executors, that they were to have nothing farther; and in the Spiritual Court the Daughter recovered a Sentence for the Reſidue of the perſonal Eſtate; from which the Executors appealed to the Delegates, and now moved in *B. R.* for a Prohibition to the ſame Delegates.

Sir *Bartholomew Shower* urged, that here being a Will, and Executors made, the Spiritual Court could not diſpoſe of any Thing from the Executors; nay, that even where the Party died Inteſtate, the Spiritual Court could not, before the late Act of 22 & 23 *Car.* 2. *cap.* 10. compel a Diſtribution: And if it could not take any of the perſonal Eſtate from the Adminiſtrator, who was the Creature of the Ordinary (*a*), much leſs had it any ſuch Power in a Caſe where there were Executors. That it

was

(*a*) Poſt 42. *Blackborough* verſus *Davis*.

(*a*) 1 Vern. 473.

was true, in *Foſter* and *Munt's* Caſe (*a*) in Chancery, it had been decreed, the Executors ſhould not have the Surplus; but there five Witneſſes expreſly ſwore, that the Teſtator had declared his Executors ſhould not have more than the particular Sums bequeathed to them*.

(*b*) 31 Ed. 3. cap. 11.

(*c*) 1 Lev. 233. Cro. Car. 62, 202. Hob. 83. in *Blackborough* verſus *Davis*, 43. but more particularly ſee the Caſe of *Edwards* verſus *Freeman*, Vol. II. 441.

Holt C. J. The Daughter, not being reſiduary Legatee, can have no Pretence of ſuing for this Surplus in the Spiritual Court: On the contrary, the Teſtator's having appointed his Brothers Executors is a Gift to them of the Reſidue, after Debts and Legacies paid. At Common Law, before the Statute ordered Adminiſtration to be granted, the Ordinary appointed Committees of the perſonal Eſtate, and in thoſe Times it was the Practice to compel ſuch Committees to diſtribute: But afterwards, when the Ordinary by Virtue of the Act of Parliament (*b*) granted Adminiſtration, this Adminiſtrator had all the Power of an Executor; and being in Nature of an Executor, it was adjudged, that he was (*c*) not compellable to make Diſtribution; which being thought hard as to thoſe of Kin to the Inteſtate in equal Degree, the Statute of Diſtribution was made. So that what is ſaid in 2 *Inſt.* 33, "that an Executor or Adminiſtrator having "paid all Debts, Legacies, and Funeral Expences, is "compellable to divide among the next of Kin", ſeems not to have been throughly conſidered.

But that the Point might be the more ſolemnly ſettled, the Executors were ordered to de-

---

* The Fact here mentioned does not appear, and though it has been frequently ſaid, that this Decree was founded on the Fraud made uſe of by the Executors, in inſinuating themſelves into their Teſtator's Favour, and prevailing with him to execute his Will at a Tavern, (*vide poſt* 116.) which indeed appears by the Regiſter's Book to have been charged in the Bill, and inſiſted on by the Counſel for the Plaintiffs at the Bar; yet it ſeems as if no Fraud was proved; ſince the Reaſon of the Lord *Jeffreys*'s Decree is expreſſed to be, "Becauſe the Words of the Will amounted "to a Declaration of Truſt, it being plain the Teſtator never deſigned "the Surplus of his Eſtate (upwards of 5000 *l.*) ſhould go to his Exe- "cutors, for that he gave them 10 *l.* a-piece, which excluded them "from any Property the Law might caſt upon them".

clare upon a Prohibition; and afterwards on Debate a Prohibition was granted*.

Upon this, the Daughter, as next of Kin, brought a Bill in Chancery (*a*) againſt the Executors for an Account of the Surplus; and though there were Proofs that the Teſtator intended his Executors ſhould have the Surplus, in regard that the Daughter had incurred her Father's Diſpleaſure by having married againſt his Conſent, yet theſe being ſomewhat doubtful, it was decreed firſt by Sir *John Trevor* Maſter of the Rolls, and afterwards by Lord *Sommers* upon an Appeal, that the Executors ſhould be but Truſtees as to the Surplus, after their Legacies paid; and that ſuch Surplus ſhould go according to the Statute of Diſtributions. And it was ſaid by Lord *Sommers*, that Equity did delight in Equality, and that the Diſtribution according to the Statute was moſt agreeable to natural Juſtice.

(*a*) 20 May 1696.

That it was dangerous to admit of parol Proof where there was a Will in Writing; however, in relation to a perſonal Eſtate (*b*), the Court would allow of Proofs and Averments; but then ſuch Proofs ought to be plain and indiſputable, to intitle an Executor to the Benefit of the Surplus; and for this Purpoſe the Court cited Lady *Gainsborough*'s Caſe (*c*) where the late Lord *Gainsborough* owed Debts by Mortgage, and made the Counteſs Executrix, againſt whom the Heir brought his Bill, to ſubject the perſonal Eſtate in the firſt place to pay off the Mortgage; and it being proved to have been the Intention of the Teſtator, that his Executrix ſhould have his perſonal Eſtate, *exempt from Debts*, and that the Lawyer who drew

(*b*) Vide 1 Vern. 31. *Fane* verſus *Fane*. Et poſt *Lady Dowager Granvile* verſus *Ducheſs Dowager of Beaufort*, 114, where ſuch Proof is admitted to rebut an Equity.

(*c*) 2 Vern. 252. Et Vol. 2. 213. *Duke of Rutland & al.* verſus *Ducheſs of Rutland & al.*

---

* The Prohibition was granted rightly; foraſmuch as the Spiritual Court, by compelling a Diſtribution, would, in Effect, compel the Execution of a Truſt, which they cannot do. See this Reaſon given *per* Lord Chancellor *Macclesfield*, in the Caſe of *Farrington* verſus *Knightly*, poſt 544.

drew the Will, having been inſtructed to inſert in the Will a Bequeſt of the perſonal Eſtate to the Wife, had replied, there would be no Occaſion for that, ſhe being to have the perſonal Eſtate (*a*) of *Courſe* as Executrix, It was decreed, that the Wife ſhould retain the perſonal Eſtate, and that the Heir ſhould not, in that Caſe, have Aid thereof, towards paying off the Mortgage, notwithſtanding that by the Rules of the Court the ſame was liable to be ſo applied.

(*a*) Poſt in *Rawlins* verſus *Powell*, 298.

Caſe 3.

Twaites and *Smith*.

[Michaelmas Vacation, 1696.]

A Child of a reſiduary Legatee no Witneſs to prove a Will relating to perſonal Eſtate by the Civil Law, by which Law only ſuch Will is determinable.

AN Appeal was brought before the court of Delegates, from a Sentence given by Dr. *Watkinſon*, Chancellor of the Archbiſhop of *York*, for the Validity and Probate of a Will of a perſonal Eſtate. The ſingle Matter in Queſtion was, that there were only three Witneſſes to the Will, and two of thoſe happened to be Children of the Reſiduary Legatee.

Wherefore it was inſiſted that thoſe two Children were not competent Witneſſes; foraſmuch as by the Civil Law the Child was not allowed to be a Witneſs for his Parent, and ſo was the expreſs Text thereof, as appears by the *Digeſt* Tit. *de Teſtibus*; and this was ſaid not to be any of the Solemnities or Ceremonies of the Civil Law, for then it might not be binding here, no Part thereof being obligatory, or neceſſary to be obſerved among us, but what is required by the Law of Nature and Nations; but the Reaſon of this Prohibition of Children from bearing Witneſs in Caſes where their Parents were concerned, proceeded from the Affection and Duty they owed to their Parents, and ſo was *Albericus Gentilis* in his Tract *De Teſtibus*, *qu.* 2. *fo.* 230.

In Anſwer to which, it was allowed to be true, that by the Civil Law Children were incapacitated as above; but then the ſame was urged to be only one of the Ceremonies of that Law, and ſo not of Force with us: Juſt as a (*a*) Woman was thereby prohibited to be a Witneſs, whereas our Law knew of no ſuch Prohibition. But admitting theſe Children were exceptionable for that Reaſon, yet here remained one Witneſs altogether without Exception, and by the Civil Law one good Witneſs might ſupply the Deficiency of another exceptionable Witneſs. See *Farinacius de Teſtibus*, *q.* 62. *fo.* 199. whoſe Words are, *Teſtis unius inhabilitas & defectus ſuppletur ex fide & habilitate alterius.*

(*a*) Women were not permitted to be preſent at the *Roman* Aſſemblies, where formerly Wills were made, and ſo could not be Witneſſes thereto. Wood's Inſt. Civil Law 17, 18.

And it being ordered by the Civilians that Precedents ſhould be ſearched, for the Appellant, the Caſe of *Marwood* verſus *Metcalf* was produced, where, upon an Appeal from the Court of *York* to the Delegates, this very Exception was inſiſted upon, and at length allowed. Alſo the Caſe of Sir *Thomas Littleton*, where the like Exception prevailed; but this laſt Caſe not being before a Court of Delegates, there were no Common Law Judges.

For the Defendant was ſhewed the Precedent of ---- lately adjudged by a Court of Delegates, where Mr. Juſtice *Powel jun.* was in the Commiſſion, and preſent, (and which at the Hearing of this principal Caſe he remembered); the Point there was upon the Revocation of a Will; and whereas by the Statute (*b*) of Frauds it is enacted, that no Will ſhall be revoked, but where the Writing revoking it is ſigned in the Preſence of three Witneſſes; it fell out that there were in that Caſe

(*b*) 29 Car. 2. cap. 3. ſect. 6. Et vide poſt 344 in *Onions* ver. *Tyrer*.

three Witneſſes, two whereof were unexceptionable, but the third, being the Child of the reſiduary Legatee, was, for that Reaſon, objected to, as no Witneſs by the Civil Law.

But it was decreed by the Judges Delegates, that there being two good Witneſſes, which were ſufficient to prove the Revocation by the Civil Law, though the Statute required a third Witneſs, yet that other Witneſs added by the Statute, needed not to be qualified according to the Civil Law: From whence the Common Lawyers inferred, that our Judges have not looked on themſelves as bound up by the Rules of the Civil Law, but at Liberty to follow their own, where the two Laws differ.

To which it was replied, *Firſt*, That this being a Will of a perſonal Eſtate only, was proper to be determined by the Canon and Civil (*a*) Laws; and that the Judges had, in all ſuch Caſes conformed thereto (*b*); indeed, where ſome temporal Matter depends on an Eccleſiaſtical Cauſe, and is neceſſary to be determined with it, there, though the Eccleſiaſtical Judges may try ſuch temporal Matter, yet they ought to do it by the Rules of the Common Law, to which it properly belongs; elſe the Common Law Judges would interpoſe by ſending Prohibitions; and that with this Diſtinction were all the Caſes, wherein the Temporal Judges had differed from the Civilians, to be reconciled.

(*a*) Poſt *Anonymus* 267, and in *Plume* verſus *Beale*, 389.
(*b*) Salk. 546. 4 Co. 29.

Secondly, That in this Caſe, the having of One good Witneſs would not help the Diſability in the reſt; for that was to be underſtood, where the Exception went only to diminiſh in part the Credit of the Witneſſes, as on account of Friendſhip, or even Relation in a further Degree, but not in Caſe of Exception to a Child, who was abſolutely prohibited to be any Witneſs at all.

Thirdly, That the Exceptions to Witneſſes in the Civil Law, and in a Cauſe triable by them, were not to be compared to ſuch Exceptions as might lie againſt Witneſſes at Common Law, where the Trial was by Jury, but rather to Exceptions to the Jury; and this of Relation was a good Cauſe of Challenge to a Juryman (*a*), even at Common Law. (*a*) 1 Inſt. 157. a.

Laſtly, (As the ſtrongeſt Argument in favour of the Exception) the conſtant Practice was appealed to; and that the Defect could not be ſupplied by another intire Witneſs, was ſaid to appear from *Swinburne*, who giving an Account of the Practice and Law here in that Particular, (*lib.* 4. *ſect.* 24.) expreſly ſays, When the Law reſiſts the Examination of Witneſſes, it ſhall not be ſupplied by any other Witneſs. Whereupon the Common Law Judges agreed with the Civilians, that theſe two Children were not to be allowed as Witneſſes; therefore the Will failed for Want of Proof, one Witneſs being by the Civil Law as no Witneſs, and ſo Adminiſtration was granted to *Twaites* the Appellant. *Powel ſen.* was a little doubtful, but thinking that in this Caſe he was to be bound by the Civilians, he at length agreed, and the Sentence given at *York* was reverſed (*b*).

Afterwards a Commiſſion of Review was ſued out upon this Sentence, but the Parties agreed, and the Executor renounced.

(*b*) *Quære*, If the Will in Queſtion appeared to be written, or ſo much as ſubſcribed, by the Teſtator's own Hand; ſince in either of theſe Caſes it would have been good without any Witneſſes at all. Vide Swinb. 300.

DE

Term. S. Hillarii,

1700. *B. R.*

Fiſher verſus *Wigg*.

Caſe 4.

Salk. 391.

Surrender of a Copyhold to the Uſe of *A. B.* and *C.* and their Heirs, equally to be divided betwixt them and their Heirs reſpectively. This held by two Judges a Tenancy in Common by reaſon of the apparent Intent of the Surrenderor, againſt the Opinion of *Holt* C. J. who thought it a Jointenancy.

EJectment: A Copyholder in Fee had Iſſue four Sons and two Daughters, and ſurrendered his Copyhold to the Uſe of his Wiſe for Life, and after her Death, to the Uſe of his three younger Sons and two Daughters, equally to be divided, and their reſpective Heirs and Aſſigns for ever.

The Queſtion was, whether theſe Words made a Tenancy in Common; or whether the Sons and Daughters took as Jointenants? And the Matter having been argued ſolemnly at the Bar, the Judges now delivered their Opinions *ſeriatim*.

Gould J. The Sons and Daughters take as Tenants in Common, and not as Jointenants.

In Conſtruction of Deeds this Rule is to be obſerved, (*viz.*) to make all Parts of them take Effect, according to the Intent of the Parties, ſo as it be not contrary to the Rules of Law; and it will not be inconſiſtent with any Rule of Law, to conſtrue this a Tenancy in Common; the Words upon which we are to judge, being not Words of Limitation, or Creation of an Eſtate, but of Qualification and Correction.

There are no preciſe Words requiſite to make a Tenancy in Common. *Lit. ſect.* 292. 1 *Inſt.* 189. *a.* *Cro. Eliz.* 695. 3 *Co.* 39. *Ratcliff*'s Caſe. The Words (equally to be divided) go to the Quality of the Eſtate, and not to the Limitation of it; a Joint Eſtate in the Premiſſes may be altered by the *Habendum.* *Hob.* 172. 1 *Inſt.* 190. *b.* *Cro. Car.* 75. A Grant to a Man and his Heirs, but if he die *ſans* Iſſue, *&c.* this turns the Fee in the Premiſſes to an Eſtate-Tail, and corrects the Generality of the preceding Words. 19 *H.* 6. 74. The Intention of the Surrenderor was to make Proviſion for his younger Children and their Heirs, which will not take Effect, if it be a Joint Eſtate. Surrenders of Copyhold Land to Uſes ſhall have the ſame favourable Conſtruction as Wills, and are not to be tied up to the ſtrict Rules of the Common Law, but expounded according to the Intention of the Party. 2 *Bulſt.* 274. 3 *Cro.* 323. *Poph.* 125, 126. *Plowd.* 151. 1 *Saund.* 151. 2 *Vent.* 365. And though there has been a running Notion paſſing *obiter* in ſome Books, that there is a Diverſity betwixt Wills and Conveyances at Common Law, yet that Matter has not been ſcanned or ſettled: For, as to the Intention of the Party, the Words in a Deed are capable of the ſame Construction as in a Will. As to the Caſe in 2 *Roll. Abr.* 90. 5. *Furſe* verſus *Weeks*, the Diverſity there is upon a Conveyance at Common Law, but here the Caſe is upon a Limitation of an Uſe. In the Caſe of (*a*) *Bliſſet* verſus *Cranwell*, *Paſcha* 6 *W.* & *M.* *C. B.* a Deviſe was to two and their Heirs, and the longer Liver of them, equally

to

(*a*) Salk. 226.

to be divided, after the Death of the Teſtator's Wife; and reſolved, this was a Tenancy in Common. The Words *equally divided*, or *equally to be divided*, make a Tenancy in Common in a Will, beyond all Diſpute, and we are here in the Caſe of an Uſe, which bears the like Conſtruction with a Will.

In 2 *Roll. Abr.* 67. *Brooks* verſus *Brooks*, the Wife was named after the *Habendum* in the Surrender of a Copyhold, and yet took an Eſtate according to the Limitation, upon that Rule of Conſtruction. *Paſchæ* 32 *Car.* 2. *B. R. Smith* verſus *Johnſon.* A Feoffment was made to two and their Heirs, equally to be divided, and there *Scrogs* and *Dolben* were of Opinion that the Feoffees were Tenants in Common, and not Jointenants; but *Jones* differed.

Turton J. was of the ſame Opinion, (*viz.*) that it was a Tenancy in Common, and argued much to the ſame Effect, only he added, that a *Præcipe* lies of two Acres *in tres partes dividend'*, which is a Tenancy in Common. 13 *Co.* 58. 21 *Ed.* 4. 22. That if this Limitation had been before the Statute of Uſes, the Chancery would have compelled a Conveyance to the Sons and Daughters in Common, and the Law ſhall have the ſame Operation ſince: That if in this Caſe, the Father had ſurrendered the Land to the Uſe of his laſt Will, and by his Will had deviſed it in theſe Words, it muſt have been agreed to create an Eſtate in Common; and there was no reaſon why a different Conſtruction ſhould be put upon theſe Words, when expreſſed in the Surrender itſelf.

Holt C. J. *contra:* Copyhold Lands do not differ (*a*) in Conſtruction of Law from Freehold Lands, and Surrenders of Copyholds muſt be governed by the ſame Rules as Conveyances at Common Law. The Opinion in

(*a*) 4 Co. 29. b. alſo in *Idle* verſus *Cook*, 75.

in *Poph.* 126. which my Brothers rely on, *(viz.)* that a Surrender is to be conſtrued as a Will, is of no Authority; for it is amongſt the additional Caſes, and not reported by *Popham*; and there is no Mention made of it in the Report of the ſame Caſe in *Cro. Jac.* 434.

If a Copyholder ſurrenders to the Lord, without declaring an Uſe, the Copyhold extinguiſhes, as on a Surrender by Tenant for Life, to him in Reverſion.

The Reſolution in 2 *Roll. Abr.* 67. *Brooks* verſus *Brooks*, was founded upon the Cuſtom of the Manor, which was, that a Perſon named after the *Habendum* ſhould take the Eſtate limited to him; ſo where a Surrender is to ſeveral by Cuſtom, they ſhall take in Succeſſion as they are named: We are not upon the Conſtruction of an Uſe, for a Surrender to an Uſe is a Limitation of the Eſtate, a Declaration and Direction to the Lord how to grant the Lands, and the Surrenderor himſelf continues ſeiſed till the Admittance of the Surrenderee, and the Perſon to whoſe Uſe the Surrender is made is not *Ceſtui que Uſe* in the mean Time, but when admitted, he is in by Grant from the Lord.

By this Surrender the Sons and Daughters are Jointenants, and not Tenants in Common: For the Words, *equally to be divided*, ſignify no more than the Law would have implied without them, and therefore they can have no Operation. 1 *Inſt.* 186. *a.* One Jointenant can only forfeit or diſpoſe of his own Part; and if both join in a Feoffment, and one die, it muſt be pleaded as the Feoffment of both, and not of the Survivor only.

The true Difference between Jointenants and Tenants in Common is put in *Lit. ſect.* 292. 1 *Inſt.* 188. *b.* Jointenants hold by one joint Title, but Tenants in

Common by ſeveral Titles. In our Caſe the Title is joint, and all claim under the ſame Conveyance; the Word (equally) doth not alter the Manner of taking the Profits, there being no Difference, in that Reſpect, between Jointenants and Tenants in Common, in regard if one Jointenant, or one Tenant in Common, take the whole Profits, his Companion has no Remedy againſt him.

So Jointenants have as ſeparate an Intereſt in the Land as Tenants in Common; for Tenants in Common were no more compellable at Common Law, to make Partition than Jointenants; and therefore in ſuing a Writ of Partition, the Party never ſhews whether he is Tenant in Common or Jointenant, but only that he is ſeiſed *pro indiviſo*. *Co. Ent.* 413, 414. In like Manner, one Jointenant may diſpoſe of his own Part, as well as a Tenant in Common, and each has an equal Proportion without thoſe Words, *equally to be divided*; neither does the Word *reſpectively* make any Alteration of the Eſtate, foraſmuch as there is no Diverſity betwixt a Grant to two and their Heirs, and a Grant to two and their reſpective Heirs, or to two and their Heirs reſpectively, ſince the Limitation muſt be to both their Heirs, or they cannot both take a Fee-ſimple, and if the Fee enures to both their Heirs, it muſt be to both their Heirs reſpectively; (which *Turton* and *Gould* agreed) and in Conſtruction of Deeds, ſuperfluous Words are to be rejected, as having no Operation. 8 *Co.* 145. *a.*

But there has been an Objection drawn from *Litt. ſect.* 298. If Lands be given to two, *Habend'* the one Moiety to one, *&c.* they are Tenants in Common.

Reſp. If a Feoffment be made to two, *Habend'* one Moiety to one, and the other Moiety to the other, this operates as ſeveral Conveyances, and not as one, for there muſt be two Liveries, becauſe there are ſeveral Freeholds, and Livery to one, *ſecundum formam chartæ*, would not enure to the other; and that Caſe is not like to ours, in regard there is an actual Diviſion and Diſtribution of the Land; whereas the Words, *equally to be divided*, do not aſſign ſeveral Parts.

If a Feoffment be made of twenty Acres to two, *Habend'* ten Acres to one, and ten Acres to the other, this *Habend'* would be void, becauſe repugnant to and inconſiſtent with the Premiſſes, by which the whole twenty Acres were expreſly granted to both; otherwiſe where a Manor is granted to two in the Premiſſes, *Habend'* one Moiety to the one, and the other Moiety to the other; theſe Words cannot make a Tenancy in Common, it being the Nature of that Eſtate for the Tenants to be ſeiſed *pro indiviſo*, but purſuant to this, they muſt hold *pro diviſo*, which is ſo far from implying a Tenancy in Common, that it directly excludes it.

But it is objected, that in 1 *Inſt.* 190. *b.* in *tres partes dividend'* implies a Tenancy in Common.

Reſp. That is not mentioned in the Caſe of 21 *Ed.* 4. 22. *b.* neither is *Coke* poſitive therein, it is only his Conjecture.

Object. Jointenants have but one Freehold; but Tenants in Common have ſeveral Freeholds.

Reſp. I agree it; but their Parts in the Land are not divided and ſeveral.

Object. Theſe Words in a Will make a Tenancy in Common.

Reſp. There is a Difference betwixt Wills and Conveyances at Law; and Words in the one ſhall have a different Conſtruction from what they would have in the other. A grant to a Man and his Aſſigns for ever, in a Deed paſſes only an Eſtate for Life; but the ſame Words in a Will give a Fee-ſimple. 27 *H.* 8. 27. So an Eſtate may paſs in a Will by Implication, but not in a Deed; the Reaſon of which different Conſtruction is, becauſe the Law conſiders the Circumſtances the Teſtator, who is *inops Concilii*, and will not hold him ſtrictly to Rules; and this Reaſon took place in the Conſtruction of Wills made by Cuſtom before the Statute of *H.* 8. as in 11 *H.* 6. 12. the Caſe of a Deviſe to an Infant *in Ventre ſa mere*; which ſame Reaſon and Rule of Conſtruction holds in Wills made ſince the Statute.

But Precedents on Wills will not influence this Caſe; the *Reaſon* of every Caſe is the *Strength* of the Caſe; the Reaſon of the Opinion in *Ratcliff*'s Caſe, 3 *Co.* 39. *b.* is not on the Force of the Words *equally to be divided*, but from the Intention.

An Eſtate in a Will may be reſtrained and qualified by the Intention of the Teſtator, without expreſs Words. 13 *H.* 7. 17. *Hob.* 34. *Cro. Jac.* 367. 1 *Jo.* 342. Where it is agreed, that the like Limitation, had it been in a Will, would have created an Eſtate-tail, tho' it did not in a Conveyance at Common Law, or in a Surrender.

2 *Roll. Abr.* 90. A Deviſe was to two equally to be divided, *Habend'* to Them and the Survivor, and the Heirs of the Survivor; and reſolved, They were Jointenants and not Tenants in Common, becauſe of the ſubſequent Words which were not repugnant to

the firſt. For the firſt Words did not make a Tenancy in Common by expreſs Limitation, but by Implication or (*a*) Conſtruction; which is the true Reaſon of the Caſe, and a full Authority for me. If the Limitation had been (*b*) expreſs, the ſubſequent Words would have been void and repugnant. *Stiles* 211, 434. *Dyer* 25.

(*a*) See poſt 37. *Philips* verſus *Philips.*

(*b*) See poſt 55. *Bamfield* verſus *Popham.*

It was after ſome Time and Debate that theſe Words obtained to make a Tenancy in Common in a Will; and the Doubt proceeded from hence, (*ſcil.*) becauſe they did not make an Eſtate or Tenancy in Common at Common Law; for if they had, there could then have been no Doubt upon a Will. It has been hitherto the conſtant Opinion, both at the Bar and on the Bench, that theſe Words will not make a Tenancy in Common in a Deed. Jointenancy is favoured in Law, becauſe, as the Law does not love Fractions of Eſtates, ſo neither does it incourage Diviſion of Tenures, or Multiplication of Services.

Now as long as the Jointenancy continues, there is a Joint Tenure, but when the Tenancy becomes in Common, then the Tenures and Services are ſeveral. 6 *Co.* 1, 2. And by ſuch Conſtructions as my Brothers make in the preſent Caſe, inſtead of one Copyhold Eſtate, and one Fine and ſingle Service, there would be five ſeveral Copyholds and as many Fines and Services; and one Tenant in Common cannot have Contribution for ſuch againſt his Companion, as a Jointenant may. This is the true and only Reaſon why joint Eſtates are favoured in Law; at leaſt, I can invent no other.

But the Caſe of *Smith* and *Johnſon* is objected.

Reſp. When that Judgment was given, no Body was ſatisfied with it; and afterwards the Rule for Judgment was diſcharged, and an *ulterius Concil* awarded, and then the Party died; ſo no Judgment was given. There is no Authority in the Books againſt my Opinion; on the contrary, the concurrent Authorities of all Times in *Weſtminſter-Hall* are for me; ſo that I think Judgment ought to be given for the *Defendant*. But my Brothers make the Majority, and therefore the *Plaintiff* muſt have Judgment.

DE
Term. S. Trinitatis,
1700. *B. R.*

Nottingham verſus *Jennings.*

Caſe 5.

Salk. 233.

A Deviſe by a Father to a ſecond Son and his Heirs for ever, and for want of ſuch Heirs, then to the right Heirs of the Teſtator, is an Eſtate-tail. But had the Deviſe over been to a Stranger, the ſecond Son would have taken a Fee-ſimple, and conſequently the Deviſe over had been void.

IN Ejectment, on the Trial, this Caſe was made: *J. S.* had three Sons, *A. B.* and *C.* and deviſed his Lands to *B.* (his ſecond Son) after the Death of his Mother, to hold to him and his Heirs for ever; and for Want of ſuch Heirs, then to his (the Teſtator's) right Heirs.

The Teſtator died, after which *B.* entered and died without Iſſue, living *A.* who was Leſſor of the Plaintiff.

It was argued by *Northey* for the Plaintiff, that the Eſtate deviſed to *B.* was but an Eſtate-tail, and not a Fee-ſimple; and that the Word (*Heirs*) ſhould be conſtrued *Heirs of His Body*; for that it muſt be intended, the Teſtator took Notice that his ſecond Son *B.* could not by any Poſſibility die without Heir, ſo long as his Father had any other Iſſue, who would be Heir to him; that this Conſtruction was founded upon the ſame Reaſon, as where a Deviſe is to one and his Heirs, and if he die without Iſſue of his Body, then to another, which is conſtrued to be an Eſtate-tail; becauſe the Teſtator appears to have intended only the Heirs of the *Body* of the firſt Deviſee. *Cro. Jac.* 415. (*a*) *Webb* verſus *Herring*. 1 *Rol. Rep.* 398, 436. *Cro. Jac.* 428, 448. 1 *Roll. Abr.* 836. 3 *Keb.* 589.

(*a*) Vide alſo the Caſe of *Parker* verſus *Thacker*, 3 Lev. 71.

Carthew for the Defendant inſiſted, that *B.* took a Fee-ſimple, and relied on the Caſe of *Hearn* verſus *Allen*, *Cro. Car.* 58. That this Caſe differed from that of *Webb* verſus *Herring*, foraſmuch as here was an expreſs Deviſe of a Fee-ſimple, but there the Son took only by Implication; and therefore the implied Eſtate was made to give Way to that which was expreſſed; which Diverſity was the Foundation of that Judgment. That it muſt be agreed, if this Remainder had been limited to a Stranger, it had been void, and *B.* would have taken a Fee-ſimple. 9 *H.* 8. 8. *b.* *Cro. Jac.* 416. *Yelv.* 209. That this Deviſe over to the Teſtator's right Heirs was intirely void; for the eldeſt Son ſhould not take by Purchaſe by the Words of the Will, but would be in by Deſcent; for which Reaſon, this Clauſe being a Nullity, and paſſing no Eſtate, it ought not to aſſiſt the Conſtruction of the Will, by making an Eſtate-tail by Implication; that the Deviſe over being *generally* to his (the Teſtator's) right Heirs, and no particular Perſon in View, and there being an expreſs Deviſe of a Fee-ſimple, and no expreſs Remainder, *B.* ought to take a Fee-ſimple, and no Implication to be made of an Eſtate-Tail.

But the whole Court adjudged it to be but an *Eſtate-tail* in *B.* And by *Holt* C. J. Tho' the Eldeſt Son ſhall not take by this Will, but ſhall be in by Deſcent, and ſo the Deviſe over void in Point of Limitation, yet it is ſufficient to manifeſt the Intent of the Teſtator, and aid the Conſtruction of an Eſtate-tail. It appears to have been the Teſtator's Intent, that the Land ſhould deſcend from himſelf, and not from his Son *B.* that the Reverſion ſhould go to his own right Heirs; and ſince that Clauſe diſcovers his Intent, it is not material whether the Deviſe over be good or not. I agree, if the Deviſe over had been to a Stranger, it had been void, and *B.* had taken a Fee-ſimple; but in the preſent Caſe the Word (*Heirs*) can import nothing more than Iſſue; for how could *B.* poſſibly die without Heir, living the other Brother? So that the Word (*Heirs*) muſt be qualified; as ſuppoſe in this Caſe the Lands had been deviſed to *B.* and his Heirs, and if *B.* die without Iſſue, then to another, this, without all Doubt, would have been an Eſtate-tail; the Caſe of *Webb* verſus *Herring* is a ſtrong Caſe, upon the Authority of which I ſhould have made no Difficulty of adjudging it an (*a*) Eſtate-tail at my Chambers.

(*a*) Vide the Caſe of the *Attorney General* verſus *Gill*, Vol. 2. 369.

Judgment for the Plaintiff.

Pett's Caſe.

Caſe 6.

Salk. 250.

Inteſtate dies leaving a deceaſed Brother's Child and a deceaſed Brother's Grandchild, the Grandchild not admitted to any diſtributary Share; the Clauſe in the Statute which ſays, that there ſhall be no Repreſentatives among Collaterals beyond Brothers and Siſters Children, being to be intended that none ſhall take by Repreſentation but the Children of Brothers and Siſters to the Inteſtate.

A Motion was made by Mr. *Lechmere*, for a *Mandamus* to the Judge of the Spiritual Court, to make Diſtribution on the Statute of 22 & 23 *Car.* 2. *cap.* 10. And the Caſe being ordered to be put in the Paper to be argued, appeared to be thus:

Sir *Peter Pett*, in *April* 1699. died Inteſtate, having neither Wife nor Child; his next of Kin was *Elizabeth*

beth, Daughter of Sir *Phineas Pett*, who was Brother to the ſaid Sir *Peter Pett*, and Adminiſtration was committed to this *Elizabeth Pett*.

The Perſons claiming Diſtribution were *Margaret* and *Peter Pett*, Children of *Peter Pett*, who was Son of Sir *Phineas*, and Brother of *Elizabeth* the Adminiſtratrix.

And the Queſtion was, whether the Inteſtate's Brother's Son's Children, being the Grand Nephew and Grand Niece of the Inteſtate, ſhould come in for a diſtributive Share with the Inteſtate's Niece? the Statute ſaying, that the perſonal Eſtate, in caſe there ſhall be be no Wife or Child, ſhall go to the next of Kin of the Inteſtate, and their legal Repreſentatives; after which comes a Proviſo, enacting, that there ſhall be no Repreſentation among Collaterals after Brothers and Siſters Children.

In Support of the Motion, Mr. *Lechmere* contended, that the Deſign of this Act was to be diffuſive, and to apportion, as much as poſſible, the Inteſtate's perſonal Eſtate, ſo that all the near Relations might be provided for; and that for this Reaſon it was properly called a Statute of *Diſtribution*; which Title could no Way be anſwered, were any one ſingle Hand allowed to ſweep away the whole; beſides that this had been hitherto the Practice in the Spiritual Court.

Againſt which, on Behalf of the Adminiſtratrix, it was urged by Mr. *Harcourt*, that theſe Grand Nephew and Grand Niece, if intitled to any diſtributive Share, muſt claim it, either as next of Kin in equal Degree, or elſe, as Repreſentatives.

And firſt, as next of Kin, there was no Colour for it; for they could not be in equal Degree of Kin, becauſe the Adminiſtratrix was the Brother's Daughter, and *Margaret* and *Peter* the Brother's Grandchildren, (that is) one Degree further.

2*dly*, As Repreſentatives, they could not be intitled; for as much as they were not Children of the Brother of the Inteſtate; that it was reaſonable to conſtrue this Statute as favourably as might be for the Adminiſtrators, ſince a great Burden lay upon them at Law, in duly adminiſtring the Inteſtate's Eſtate; and this Statute of *Car.* 2. took away from their Profit, but did not at the ſame Time (as it ought to have done) leſſen their Burden. He cited *Raym.* 469. *Carter* verſus *Crawley*, C. J. *North*'s Opinion; and ſaid, that it had been ſo ſettled in Chancery in the Caſes of *Clement* and *Harris* 1680. *(a) Maw* verſus *Harding*, 20 *July* 1691. and *Newcomb* verſus *Tucker*, 16 *Feb.* 1694.

(*a*) 2 Vern. 233. Precèd. in Chan. 28.

That it was true, among Lineals, Repreſentatives *ad infinitum* ſhould ſhare in the Diſtribution, otherwiſe among Collaterals.

Holt C. J. Sir *Walter Walker*, a famous Civilian, drew this (*b*) Act for Diſtribution; and the only Queſtion now before us upon it is, whether the Words *Brothers and Siſters Children* in the Proviſo, ſhall not be intended Brothers and Siſters Children of the *Inteſtate?* Now ſurely they ought to be ſo taken; for the Inteſtate is the Subject Matter of this Act; it is his Eſtate, his Wife, his next of Kin, his Children, and conſequently his Brothers Children, that the

---

(*b*) And except in ſome few Inſtances mentioned therein, this Statute is to be governed and conſtrued by the Rules of the Civil Law. *Per* the Maſter of the Rolls, (Sir *Joſeph Jekyll*,) in the Caſe of *Mentney* verſus *Petty*. Preced. in Chan. 593.

Statute ſpeaks of; ſo that the relative Terms made uſe of throughout, have the Inteſtate for their Correlative. The Intent of the Proviſo was to confine the Degrees of Repreſentation, that they ſhould not go beyond Brothers and Siſters Children. And if this Conſtruction has not hitherto prevailed in the Spiritual Court, the Parties are at Liberty to appeal.

Et per Gould J. It has been always ſaid, the Statute ſhall not be taken in favour of Diſtributions.

Wherefore the *Mandamus* was denied; the whole Court declaring, that among Collaterals, ſaving only in the Caſe of Brothers and Siſters Children, Proximity of Blood ſhould give Title to the perſonal Eſtate of the Inteſtate.

See 2 Vern. 168. *Beeton* verſus *Darking & e cont'*: but more particularly the Caſe of *Bowers* verſus *Littlewood* 595, poſt. where Lord Chancellor *Macclesfield* declares the Law to be ſettled by the Reſolution above mentioned.

DE

Term. S. Michaelis,

1700.

Cox's Caſe.

Caſe 7. *Lord Keeper Wright.*

Salk. 672. the ſame Point argued, but no Reſolution.

COX was libelled againſt in the Spiritual Court at *Exeter*, for teaching School without Licence from the Biſhop, and on the 14th of *December* laſt, on my Motion before the then Lord Chancellor, an Order was made, that Cauſe ſhould be ſhewn, on the firſt Day of the Term then next following, why a Prohibition ſhould not go, and that in the mean Time all Things ſhould ſtay; which Order had been from Time to Time inlarged to this Day.

The Spiritual Court has Juriſdiction of Grammar Schools, but in caſe of a Libel for teaching School generally, without ſaying what School, the Temporal Courts will grant a Prohibition.

And now the *Attorney General* and Dr. *Waller* moved to diſcharge the ſaid Order, alledging, that before the Reformation, this was certainly of Eccleſiaſtical Juriſdiction, and in Proof of it they cited the 11th Canon of the Council of (*a*) *Lateran*, held *Anno* 1215. which Canon, (as well as that for making Tithes parochial,) has been received by Cuſtom into this Kingdom, and ſo made Part of our Eccleſiaſtical Laws.

(*a*) Decree 6. Title 5. cap. 1, 2, 3.

That the 1ſt of *Eliz. cap.* 1. having reſtored the Spiritual Juriſdiction to the Crown, which had been uſurped by the Pope, immediately thereupon the Queen ſet forth (*a*) Eccleſiaſtical Injunctions, the 40th whereof is, that no Man ſhall take upon himſelf to teach School, but ſuch as is allowed by the Ordinary; the making of which Injunctions by the Eccleſiaſtical Power of the Crown, ſhews them to be of an Eccleſiaſtical Nature, and conſequently cognizable in the Spiritual Court.

(*a*) See Sparrow's Collections 305.

That it muſt be admitted, theſe Injunctions were not confirmed by any Act of Parliament, but their being referred to, and mentioned in 5 *Eliz. cap.* 1. was an Argument that the Legiſlature did approve of them; that in the 12th Year of that Queen, the ſaid Injunctions (and among them, this againſt teaching School without Licence from the Ordinary) were, by the Convocation then ſitting, turned into Canons; that afterwards the 23d of *Eliz. cap.* 1. was the firſt Statute that prohibited it, ſince which two (*b*) others had followed; but none of them tended to deſtroy the Eccleſiaſtical Juriſdiction, only, by making the Offence puniſhable in both Courts, gave a Remedy where there was none before; that in the 1 *Jac.* 1. the Convocation met, which reduced all the Canons into one Body, and then particularly made this Canon, that none ſhould teach School without Licence from the Ordinary; and though it might be difficult to prove, that theſe canons were directly confirmed by Act of Parliament, yet there was a Sort of Confirmation of them in 4 *Jac.* 1. *cap.* 7. for the founding and incorporating a Free Grammar School at *North-Leech* in the County of *Glouceſter*, whereby the Provoſt and Scholars of *Queen*'s College in *Oxford* were to nominate the School-Maſter and Uſher of the

(*b*) 1 Jac. 1. cap. 4. 13 & 14 Car. 2. c. 4.

the ſaid School, and to make ſuch Ordinances for the Government thereof as they ſhould ſee meet, ſo that the ſame were not repugnant to the King's Prerogative, to the Laws and Statutes of the Realm, or to any *Eccleſiaſtical Canons or Conſtitutions of the* Church of England.

But on the other Side it was anſwered, that there could not be one Canon or Precedent before the Reformation, cited to prove the Keeping of School to be of Eccleſiaſtical Cogniſance; for that ſuppoſing the Council of *Lateran* to have been in every Part thereof received in *England*, yet the Canon cited did not prove the Point for which it had been produced, that Canon only appointing Schoolmaſters in *every Cathedral Church*, and ſuch Schoolmaſters to be licenſed by the Biſhop; which was but reaſonable, *(viz.)* that he who taught in the Biſhop's Church ſhould be approved of by the Biſhop; that the Teaching of School was not in the Nature thereof Spiritual; and it would be hard to affirm that it was of Eccleſiaſtical Juriſdiction, or cogniſable by the old Eccleſiaſtical Laws of the Kingdom received by common Uſe, at the ſame Time that not one ſingle Precedent of any ſuch Law or Uſage before the Reformation was to be found. And that as to the canons made ſince, they did not bind a Lay-man, (as *Cox* was ſuggeſted to be) becauſe the Laity was not repreſented in Convocation; and it was a fundamental Maxim of our Government, that what bound all muſt be aſſented to by all; neither could a Reference to the Canons in a private Act of Parliament add any greater Weight to them than they had before.

That this was a Caſe which deſerved great Conſideration, having before been in the other Courts of *Weſtminſter-Hall*, where ſeveral Prohibitions had been granted

(*a*) Salk. 105.

ed on this very ſame Point, in order that it might receive a judicial determination, but the other Side would never venture to go on; as in the Caſe of * *Belcham* verſus *Barnardiſton* in *C. B.* and in *B. R. Oldfield*'s Caſe, *Mich.* 9 *W.* 3. *Chedwich*'s Caſe, *Mich.* 10 *W.* 3. *Scorrier*'s Caſe, *Trin.* 11 *Will.* 3. And 12 *W.* 3. one *Daviſon*'s (*a*) Caſe, who being brought to the Bar on a *Habeas Corpus*, it appeared thereon that he was committed on an *Excommunicato Capiendo*, being excommunicated for teaching School without Licence, and the Court holding it to be a doubtful Point, bailed him during their Conſideration thereof; which Practice of the other Courts in *Weſtminſter-Hall*, ſhewed it to be a Matter not fit to be determined on a Motion, but in a judicial Way. But ſuppoſing it to have been originally a Spiritual Crime, yet being now made a Temporal one by ſeveral Acts of Parliament, it was thereby drawn from the Spiritual to the Temporal Juriſdiction.

Lord Keeper: Both Courts may have a concurrent Juriſdiction; and a Crime may be puniſhable both in the one and the other. The Canons of a Convocation do not bind the Laity without an Act of Parliament: But I always was, and ſtill am of Opinion, that Keeping of School is by the old Laws of *England* of Eccleſiaſtical Cognizance, and therefore let the Order for a Prohibition be diſcharged.

Whereupon I moved, that this Libel was for teaching School *generally*, without ſhewing what School; and Court Chriſtian could not have Juriſdiction of

---

* *Paſch.* & *Hill.* 10 & 11 *W.* 3. where the chief Queſtion was, Whether a Schoolmaſter might be proſecuted in the Eccleſiaſtical Court for not bringing his Scholars to Church, contrary to the 79th Canon in 1603? And it was the Opinion of *Treby* C. J. and *Powel* J. and the Court, That the Schoolmaſter being a Layman, was not bound by the Canons.

Writing Schools, Reading Schools, Dancing Schools, *&c.*

To which the Lord Keeper aſſented, and thereupon granted a Prohibition as to the teaching of all Schools, excepting Grammar Schools, which he thought to be of Eccleſiaſtical Cogniſance.

DE
Term. Paſchæ,
1701.

Caſe 8.

Philips verſus *Philips*.

2 Vern. 430. Precedents in Chanc. 167.

THIS was a Caſe ſent out of Chancery to the Juſtices of *C. B.* for their Opinion. *William Philips* had a Wiſe named *Elizabeth*, and one only Daughter named *Martha*, and being ſeiſed in Fee of divers Lands in the Counties of *Flint* and *Denbigh*, deviſed his Lands, to Truſtees and their Heirs, in Truſt, that the Profits thereof ſhould be equally divided betwixt his Wiſe and his Daughter, during the Life of the Wife, and after her Deceaſe, he deviſed the Lands to the Truſtees and their Heirs, to the Uſe of his Daughter *Martha*, and the Heirs of her Body for ever, with divers Remainders over, one of which (as to Part of the Lands) was to the Plaintiff, the now Heir at Law of the Teſtator.

A. by Will deviſes Lands to Truſtees and their Heirs, in Truſt, that the Profits ſhould be equally divided between his Wife and Daughter (the Heir of the Teſtator) during the Wife's Life, and after her Death he deviſes the ſame to the Uſe of his Daughter in Tail, with Remainders over; the Daughter dies without Iſſue, and Inteſtate, during the Mother's Life: Reſolved by the Opinion of all the Judges of *C. B.* that the Mother and Daughter were Tenants in Common, and that the Mother ſhould have a Moiety of the Profits during her Life, and that the other Moiety, by the Statute of Frauds and Perjuries, ſhould go to the Executors or Adminiſtrators of the Daughter, as before that Statute it would have been liable to Occupancy, and not to the Heir of the Teſtator, as Profits undiſpoſed of and reſulting to him.

The Teſtator died, after which *Martha* the Daughter died without Iſſue, and Inteſtate, in the Life of the Wife, who took out Adminiſtration to her Daughter: And the Queſtion was, betwixt the Plaintiff the Teſtator's Heir at Law, and the Defendant the Wife, whether the Daughter's Moiety of the Premiſſes ſhould deſcend or reſult to the Teſtator's Heir at Law, or whether the Teſtator's Wife ſhould have the Whole for her Life?

And I argued on Behalf of the Wife as follows:

I will admit that this, being a Deviſe of a Truſt, ſhall have the ſame (*a*) Operation and Conſtruction as if it were of a legal Eſtate; and that nothing in this Caſe can make a Queſtion, but the Words [equally divided] for if they were out, then the Caſe would be, I deviſe the Profits of my Lands to my Wife and Daughter during the Life of my Wife, which would plainly make them Jointenants, and the Wife ſurviving would have the Whole for her Life: So that,

(*a*) Vide 109, in *Watts* verſus *Ball.*

Firſt, It is to be conſidered, whether the Words [equally to be divided] will in this Caſe make a Tenancy in Common?

Secondly, Admitting they do make a Tenancy in Common, whether there be not a ſubſequent Deviſe to the Wife for her Life by Implication? The Words being, *After the Deceaſe of my Wife*, I deviſe the Lands to my Daughter (who was Heir at Law) and the Heirs of her Body.

Thirdly, Admitting both theſe Points to be againſt me, (*viz.*) that it is a Tenancy in Common, and that the Wife has no Deviſe to her for her Life by Implication, whether this Eſtate does not go to the Daughter's Executors or Adminiſtrators, and not to the Heir at Law of the Teſtator? in which Caſe it will belong to the Wife, who hath a Right to adminiſter to the Daughter.

As to the firſt, I take it, that the Words (equally divided, or to be divided) will not make a Tenancy in Common in this Caſe.

I admit theſe Words, in Caſe of a Deviſe of the *Inheritance*, or of a *Leaſe for Years*, will make a Tenancy in Common; but where the Deviſe is for *Life*, (which is our Caſe) the Law is otherwiſe.

In Caſe of a Deviſe of an *Inheritance*, where Lands are given to two and their Heirs equally, the Reaſon why it is a Tenancy in Common is, for that it appears to be the Intent of the Teſtator, that each of the Deviſee's Heirs ſhould have an equal Share in the Inheritance; which could not be, if they (the Anceſtors) were Jointenants; for then, if one were to die, the Heir of him dying firſt ſhould have nothing, and the Survivor would be intitled to the whole Eſtate, as from the Donor.

But in Caſe of a Deviſe to two for their *Lives* equally, it can be of no Advantage to the Deviſees to have it conſtrued a Tenancy in Common; for if one dies, ſuppoſing it to be a Tenancy in Common, the Eſtate, as to a Moiety, determines, and the Remainder-Man or Reverſioner ſhall enter; wherefore it cannot be any Loſs to the Deviſees to conſtrue it a Jointenancy, and to carry ſuch Moiety to the Survivor of them. This, I ſay, is no Prejudice to the Deviſee that dies firſt; and agreeable hereto was the (*a*) Opinion of the Lord C. J. *Popham*, which I do not remember to have ſeen impeached in any Book: And it is exactly our Caſe, as

(*a*) Cro. Eliz. 696. *Lewen* verſus *Cox*.

to this Point; for there can be no Difference betwixt a Deviſe to two for their Lives, and a Deviſe to two for the Life of one of them, in regard that though in the laſt Caſe there is not an equal Advantage of Survivorſhip, yet according to 1 *Inſt.* 181. *b.* it is a good Jointenancy.

And this Opinion of C. J. *Popham*, holding that the Words, [equally divided,] do not make a Tenancy in Common, in Caſe of a Deviſe for *Life*, as they will where the Deviſe is of an *Inheritance*, ſeems to have the more reaſonable Foundation, for that the Words [equally divided] according to 2 *Roll. Abr.* 90. (*Furſe* verſus *Weeks*) make a Tenancy in Common by (*a*) Conſtruction only, and Collection of the Intent of the Teſtator.

(*a*) *Fiſher* ver. *Wigg*, 21. Salk. 227, 392. 2 Vern. 323.

That Caſe was, A Man ſeiſed in Fee had two Daughters and a Son, and deviſed his Land to his two Daughters, equally to be divided between them, and the Survivor of them, and the Heirs of the Body of the Survivor, upon which Deviſe the two Daughters were adjudged to be Jointenants, and not Tenants in Common, notwithſtanding the Words [equally to be divided;] for, ſays the Book, in a Deed or Grant, the Words, equally to be divided, will not make a Tenancy in Common; and in a Will they only make a Tenancy in Common by Conſtruction; for if other Words in the Will ſhew it to have been the Intent of the Teſtator, that it ſhould rather be a Jointenancy, than a Tenancy in Common, it ſhall be ſo: And in this Caſe, the ***Habendum*** being to the Survivor of them, and the Heirs of her Body, was a ſtrong Evidence that the Teſtator intended a Jointenancy, without which the Survivor could not take it; ſo that here it was adjudged a Jointenancy, and not a Tenancy in Common notwithſtanding the Words, equally to be divided.

Now the Intent in the principal Caſe ſeems to have been chiefly to provide for the *Wife:* It is the Wife's Life only that the Will expreſly mentions.

I admit, by the Will the Profits are to be divided, during the Mother's Life, between the Mother and Daughter; but when the Daughter is dead, (ſo that there can be no longer a Diviſion of the Profits between them) then the Mother (the Teſtator's Wife) ſhall have the Whole; but if the Intent be not ſo plainly expreſſed, as I contend it is, yet it being a Deviſe of the Premiſſes for *Life* only, I adhere to the Lord *Popham*'s Opinion, that the Words [equally to be divided] will not, in ſuch Caſe, make a Tenancy in Common.

As to the ſecond Point, That ſeems very plain for me.

The Deviſe is of the Profits to the Teſtator's Wife and Daughter during the Life of the Wife, and after the Deceaſe of the Wife, then to the Uſe of the Daughter and the Heirs of her Body, with Remainder over.

Now by Virtue of theſe Words, I deviſe, after the Deceaſe of my Wife, to my Daughter and the Heirs of her Body, the Daughter *being Heir* at Law, this is a Deviſe by Implication to my Wife for her Life.

I agree, a Deviſe to one who is *not* my Heir at Law, after the Death of my Wife, is no Deviſe by Implication to my Wife; for in that Caſe it ſhall deſcend to the Heir at Law in the mean Time; but where the Deviſe is to the *Heir* at Law, after the Death of the Wife, this is a plain and neceſſary Implication, that the Wife ſhall have it for her Life; for no other Perſon can take it, the Heir being expreſly excluded until the Death of the Wife; this is the (*a*) known Caſe of 13 *H.* 7. 13. *Bro. Deviſe* 52. *Cro. Jac.* 75. *Horton* verſus *Horton*. *Vaugh.* 263. *Gardiner* verſus *Sheldon*.

(*a*) *Willis* verſus *Lucas*, 473.

In *Cro. Eliz.* 15. *Higham* verſus *Baker*, there is a much ſtronger Caſe adjudged: And that was, one ſeiſed in Fee of a Meſſuage and Lands thereto belonging, called *Maſcals*, deviſed this Meſſuage, *&c.* to his Wife *Alice*, and his *younger Son Robert*, for Payment of Debts and Legacies, and after the Death of the Wife, the Remainder to *Robert in Fee*; the Debts and Legacies were paid: And upon this it was reſolved, the Wife ſhould have an Eſtate for Life by Implication; which differs from our Caſe only in being ſtronger; for there the Deviſe after the Death of the Wife was not to the *Heir*, but to a *younger Son*, and yet it was adjudged to operate as a Deviſe to the Wife for her Life; ſo that it ſeems to be pretty clear, in the principal Caſe, that the Wife has an Eſtate for Life by Implication. But,

Thirdly, Admitting it to be a Tenancy in Common; admitting it likewiſe to be no Deviſe by Implication to the Wife, yet the Executors or Adminiſtrators of the Daughter, and not the Heir at Law of the Teſtator, will have Title.

For then, ſuppoſing it to be a Tenancy in Common, the Caſe would be but thus: I deviſe my Lands to my Wife and my Daughter for the Life of my Wife, to hold by Moieties, and the Daughter dies during the Life of the Wife, *Q.* What ſhall become of her Moiety?

If this were all the Caſe, ſuch Moiety muſt go to the Daughter's Executors or Adminiſtrators during the Life of the Wife; for the Daughter is plainly Tenant *pur auter vie*, as to her Moiety, and as the Remainder-

Man or Reverſioner can claim nothing till after the Death of the Wife, then this Eſtate *pur auter vie* in the Daughter's Moiety muſt go to the Occupant, which the (*a*) Statute of Frauds appoints to be the Executor or Adminiſtrator; and in the preſent Caſe the Mother is Adminiſtratrix.

(*a*) 29 Car. 2. cap. 3. ſect. 12.

If I deviſe Lands to *A.* for the Life of *B.* on *A.*'s Death, they muſt go to *A.*'s Executors during the Life of *B.* So if I deviſe Lands to *A.* and *B.* for the Life of *B.* to hold by Moieties, if *A.* dies, his Moiety ſhall go to his Executors or Adminiſtrators during the Life of *B.* and the Mother in this Caſe is the Adminiſtratrix or Occupant, and conſequently it belongs to her.

Wherefore upon the whole, *quacunque via data*,

If the Mother and Daughter are Jointenants, the Mother, as Survivor, has the Whole; ſo likewiſe if there be a Deviſe to her by Implication; and if both theſe be againſt us, then the Mother as Occupant, or by the Statute of Frauds as Adminiſtratrix to her Daughter, will be intitled to her Moiety.

Note the *Variety* of Opinions in this Caſe; for *Elizabeth Philips* the Mother bringing a Bill for an Account of the Profits of her Daughter's Moiety ſince her Death, and the Cauſe being heard before the Maſter of the Rolls, he held that *Elizabeth* and *Martha* were Jointenants, and that all ſurvived to *Elizabeth*.

Upon an Appeal to Lord *Sommers*, then Lord Chancellor, his Lordſhip held, that *Elizabeth* and *Martha* were Tenants in Common, and that *Martha*'s Eſtate determining by her Death, the Remainder-Man or Reverſioner had a Right to that Moiety.

Afterwards Lord Keeper *Wright*, upon a Rehearing, was of Opinion, that an Eſtate by Implication did ariſe to *Elizabeth* in *Martha*'s Moiety, after the Death of *Martha*. But,

Upon his Referring it to the Court of *C. B.* for their Opinion, they conceived, that *Elizabeth* and *Martha* were Tenants in Common, and that *Martha* had an Eſtate *pur auter vie*, which upon the Statute of Frauds (that takes away Occupancy) ought to go to *Martha*'s Adminiſtratrix (*ſcil.*) *Elizabeth* the Mother, and that *Martha* had not an Eſtate-Tail in the Truſt, for that Mergers are odious in Equity, and never allowed, unleſs for ſpecial Reaſons.

Blackborough verſus *Davis*.

Caſe 9.

Daubegny Bentney, being poſſeſſed of a conſiderable perſonal Eſtate, died Inteſtate, leaving a Grandmother and an Aunt his next of Kin; the Spiritual Court granted Adminiſtration to the Grandmother; upon which Motion was made to the Court of *King's Bench* for a *Mandamus* to the Spiritual Court, commanding them to grant Adminiſtration to the Aunt, as more near of Kin than the Grandmother. *Broderick* and Serjeant *Darnell* were for the *Mandamus*, and Sir *Bartholomew Shower* and *Cheſhire cont'*.

Salk. 38, 251. One dies Inteſtate, leaving an Aunt and a Grandmother his next of Kin, the Grandmother is nearer of Kin than the Aunt, and is intitled to Adminiſtration in Preference to her; neither is the latter to come in for a diſtributory Share. See the ſame Point determined in the Caſe of *Woodroff* verſus *Wickworth*, upon the Strength of this Reſolution. Precedents in Chan. 527.

And for the *Mandamus* it was urged, that the Aunt was nearer of Blood than the Grandmother, and as ſuch intitled to the Preference, by Virtue of the Statute of 21 *H.* 8. *cap.* 5. That the Ordinary had no

Authority to grant Adminiſtration contrary to the Statute; and that having granted it tortiouſly, he ought to rectify it.

They admitted, that before the Statute of *Edw.* 3. the Ordinary was not compellable to grant Adminiſtration to the next of Kin, and that the Adminiſtrator was at that Time only as a (*a*) Servant to the Ordinary; but by the 31 *Edw.* 3. *cap.* 11. the Ordinary was obliged to commit Adminiſtration to the *neareſt and moſt loyal Friends* of the Inteſtate; yet the 21 *H.* 8. *cap.* 5. gave the Ordinary an Election to grant Adminiſtration to the next of Kin, or any in equal Degree; but it was ſaid, if the next of Kin, at the Time of the Death of the Inteſtate, were diſabled by Attainder, *&c.* and afterwards the Diſability ſhould be removed, the Ordinary ought to grant Adminiſtration to him; but in Caſe Adminiſtration had been before granted, and pending the Diſability, it was made a Queſtion in 1 *Sid.* 371. (*Offley* verſus *Beſt*) whether ſuch Grant of Adminiſtration ought not to be repealed, before the next of Kin ſhould obtain a Grant of it? in regard the Intereſt was veſted; but that the Difference was, where the Adminiſtration was granted to the next of Blood, and where to a Stranger: In the laſt Caſe, the new Adminiſtration ought to be granted without any formal Repealing of the firſt, the very Act of granting the new Adminiſtration amounting to a Repeal. 1 *And.* 303. *Ow.* 50. *Cro. Eliz.* 460. For that the Ordinary had never in this Caſe executed his Authority. And therefore, though in *Packman*'s Caſe 6 *Co.* 18. *b.* it was done upon a Citation, yet it did not follow that it could not have been done without it; of which Opinion was *Popham*, in *Cro. Eliz.* 460. And if the Ordinary might do it without a Citation, the Court of *King's Bench* would oblige him, and the rather, after he had (as in the principal Caſe) granted it contrary to the Statute;

(*a*) *Petit* verſus *Smith* 7.

but probably the *Mandamus* would not confine him to any particular Manner of doing it; for which Reaſon it might be done by Citation, if that were more proper: Beſides, the Adminiſtration might have been granted in Time of Vacation before Application could be made for a *Mandamus*.

But afterwards, on great Conſideration, a *Mandamus* was denied by all the Court. And,

Per Holt C. J. In the Vacation Time one may reſort to the Chancery, and upon a Suggeſtion that the Spiritual Court has proceeded to grant Adminiſtration to a wrong Perſon, may have a Prohibition out of that Court returnable into *B. R.* or *C. B.*

The Authorities that have been cited, are grounded upon a Reaſon that is not Law; for the Adminiſtrator, at this Time, is not a Servant to the Ordinary, but has as fixed an Intereſt as an Executor, who is appointed by the Party himſelf; and though the Ordinary be by the Statute of 21 *H.* 8. *cap.* 5. reſtrained to grant Adminiſtration to the next of Blood, yet he is not ſo reſtrained, as to make an Adminiſtration granted by him, though contrary to the Statute, a meer Nullity; for if ſuch Adminiſtration were void, then all Diſpoſitions of the Goods of the Inteſtate, pending the ſaid Adminiſtration, and before the Repeal of it, would be void alſo; and after it was repealed, Trover would lie for theſe Goods, which cannot be.

Adminiſtration committed contrary to the Statute is not void, but voidable.

Thus if an Adminiſtration committed to a Creditor, be afterwards repealed at the Suit of the next of Kin, the Creditor ſhall (*a*) retain againſt the rightful Adminiſtrator; and all Diſpoſitions of Goods made by him pending the Citation ſhall ſtand; for this is not like the Caſe of an Adminiſtration granted by a Biſhop of an

(*a*) 6 Co. 18.

an inferior Dioceſe, where the Inteſtate had *Bona Notabilia* in divers Dioceſes, becauſe there ſuch Adminiſtration is abſolutely void. It ſhall be a good Return to the *Mandamus*, that Adminiſtration is already committed, and that there is no *Lis pendens*. Not that I would be underſtood to intimate hereby, that in Caſe there had been a Citation pending, I ſhould have been for granting a *Mandamus*; but without Queſtion, before this the Motion is made too ſoon.

(*a*) 1 Sid. 179.

In the Caſe of (*a*) Sir *George Sands*, the Adminiſtration was granted to the Brother, who continued to adminiſter ſome Time, and afterwards, one pretending to be the Wife of the Inteſtate, commenced a Suit in the Spiritual Court to repeal the Adminiſtration committed to the Brother, inſiſting that it ought to be committed to the Wife; and the Brother applied here for a Prohibition, becauſe the Ordinary had a Power to grant it either to the Wife, or next of Kin; and it was held, that the Ordinary could not repeal the Adminiſtration granted to the Brother, for that he had executed his Authority.

There was the Caſe of *Duncomb* verſus *Maſon*, where a Feme Covert died Inteſtate, having Debts due to her, (which the Law does not give to the Husband;) and Adminiſtration being granted to the next of Blood, the Baron ſued in the Spiritual Court to repeal this Adminiſtration, and after Prohibition and Declaration thereupon, the Queſtion was, whether the Husband ſhould repeal this Adminiſtration?

And reſolved he ſhould: On the other Side the Caſe of Sir *George Sands* was objected, but the Court were of Opinion, this Caſe was not at all affected by that of Sir *George Sands*, for that the Husband had an original Right by the 31 *Edw.* 3. *cap.* 11. as the *moſt loyal*

Friend of the Wife, and was not within the 21 *H.* 8. *cap.* 5. ſo that the Ordinary had not an Election in caſe of the Husband.

It was alſo held, that the Grandmother was, at leaſt, as near of Kin as the Aunt; for in the Caſe of a Deſcent of Lands, it would be a mediate Deſcent, and the *Medium* to both was the Father; and it was enough to ſay Brother and Heir, or Siſter and Heir, which was the great Reaſon in the Caſe of (*a*) *Collingwood* and *Pace*; and the Grandmother ſeemed to have the Advantage, ſhe being of the right Line, and the Aunt of the Collateral; wherefore for theſe Reaſons a *Mandamus* was denied. (*a*) 1 Vent. 413.

Note; Sir *Barth. Shower* cited the Caſe of *Burton* verſus *Sharp* laſt *Trinity* Term, where Adminiſtration was ſued to be granted to the Great Grandmother, upon which the Aunt moved for a Prohibition in *C. B.* to ſtay the Suit in the Spiritual Court, but a Prohibition was denied.

The Court having thus refuſed a *Mandamus* for the Repealing this Adminiſtration, and for the Granting a new one to the Aunt, a Motion was afterwards made by Serjeant *Darnel* and *Broderick*, for a *Mandamus* to be directed to the Judge of the Prerogative Court, commanding him to direct Diſtribution of the Inteſtate's perſonal Eſtate to the Aunt as well as the Grandmother. 1 Salk. 251.

It was inſiſted, that this Method was proper, the Aunt being intitled to Diſtribution by the 22 & 23 *Car.* 2. equally with the Grandmother; that the Diſtance of Degrees was to be computed from the Inteſtate, and not between themſelves; that by the Canon Law the Aunt was as near in Degree as the Grand-

(a) 1 Inſt. 23. b.

(b) 3 Mod. 58. 1 Vern. 403. 2 Vern. 274.

mother; and tho' the Civil Law (a) differed from the Canon, yet that could not bind us here; that the Deſign of the 22 & 23 *Car.* 2. was to fix a Rule in Diſtributions, and not to leave it to the Diſcretion of the Judge; that every Perſon intitled to his diſtributory Share had an Intereſt (b) veſted in him before Diſtribution actually made (c); that the Degree of Relation between the Aunt and the Nephew was only *Mediante Patre*; and in a Writ of Formedon, the Plaintiff, in making out his Title, might, without mentioning any other, derive it immediately from the Father: That it was true by the Civil Law, the Grandmother, (or indeed any Anceſtor immediately lineal to the Inteſtate, tho' never ſo remote,) ſhould be preferred, as being in the lineal aſcending Line, and *in loco Parentis*, before the Brother and Siſter or any other in the Collateral Line; but that ſeemed againſt all Reaſon; that in the Caſe of *Carter* verſus *Crawley*, *Raym.* 491. no Notice was taken of the Grandmother.

Sir *Barth. Shower cont'*: The 22 & 23 *Car.* 2. does not warrant this *Mandamus*; for it does not oblige or enable the Ordinary to do any Thing which was not the Courſe of their Courts before; it may, poſſibly, be a good Cauſe of Appeal, but can be no Ground for a *Mandamus*, being a Matter of Eccleſiaſtical Juriſdiction; by the Civil Law, the Grandmother is nearer of Kin than the Aunt. I admit a *Mandamus* may be granted to make Diſtribution *generally* among the next of Kin, but not to command the Ordinary to grant Diſtribution to *A.* and *B.* as next of Kin in *particular*; for that would be

---

(c) *Carthew* 51. So that tho' a Perſon intitled to Diſtribution dies before Diſtribution made, yet it ſhall veſt in him; the Clauſe directing that diſtribution ſhall not be made until a Year after the Death of the Inteſtate, being meerly for the Benefit of Creditors. But it is to be obſerved, that tho' each diſtributory Share veſts on the Inteſtate's Death, yet the ſame doth not ſo veſt as to exclude a poſthumous Child. Vide poſt *Edwards* & *al'* verſus *Freeman* & *al'*.

to take from the Spiritual Courts the Power they have of judging which Degree of Relation is next of Kin, when the Subject Matter does not belong to the Temporal Courts; as it may, when the Diſpute is betwixt the Adminiſtrator and a Creditor.

No *Mandamus* will lie to give a ſpecifick Legacy or Sum of Money to a particular Legatee; and thoſe who are intitled to a Diſtribution, as next of Kin, are (*a*) Legatees in Law, no others being appointed by any Will.

(*a*) 2 Vern. 710. and poſt. *Trevor v. Trevor*, 628.

Holt. C. J. If the Eccleſiaſtical Judge act contrary to Law, may not this Court oblige him to purſue the Law? Is there any Difference betwixt granting a Prohibition to ſtop them from going Wrong, and a *Mandamus* to guide them Right?

Mandamus lies to the Spiritual Court to direct them to do Right, as a Prohibition lies to ſtop them from doing wrong.

A Prohibition was granted upon this Statute *inter Smith* and *Tracy*, 1 *Vent.* 307, 316, 323. and the Conſultation awarded afterwards, was not becauſe the Prohibition did not regularly lie, but for that the Eccleſiaſtical Court proceeded and determined Right; and as to Appealing, if the conſtant Opinion of the Civilians be againſt the Rule of Law, it is then in vain to put the Party to his Appeal; as was reſolved in the Caſe of (*b*) *Shotter* verſus *Friend*, where they would not admit of Proof of Payment of a Legacy by one Witneſs.

(*b*) Salk. 547. Carth. 142.

Shower: The Superior Court never ſends a *Mandamus* to an Inferior Court to act contrary to their Rules and Opinions; as on a Reverſal of a Judgment, it is the Superior Court that gives the (*c*) new Judgment; the Superior Court often ſends Prohibitions to Inferior Courts, but how can this or any other Court command a judicial Officer to act againſt his Opinion?

(*c*) Vide Salk. 403.

Afterwards Dr. *Lane* argued againſt the *Mandamus*, that the Grandmother ſtood in the Place of the Father and Mother, who, by the Civil Law, had the Right of Succeſſion, excluſively of the Brothers and Siſters; that the Grandmother, by the Civil Law, ſtood in the ſecond Degree to the Inteſtate, and the Aunt in the third. It was true, the Canon Law differed in placing the Aunt in the ſecond Degree, the Reaſon of which was, on the Account of Marriages, for in that particular, they were apt to confound the Degrees of Nature; that the Aunt in this Caſe was the Daughter of the Grandmother, and could not be in equal Degree with her Mother; ſo neither could ſhe be intitled by the Statute of Diſtributions, nor conſequently to a *Mandamus*; that the Children of Uncles had no Right to Diſtribution by Repreſentation, in Concurrence with the Uncles, as had been adjudged and confirmed by conſtant Practice; that if Mothers Children before the Statute of 1 *Jac.* 2. *cap.* 17. had no Right to Diſtribution, then ſurely the Grandmother's Children could have no Right, till it was given them by ſome Law.

Holt C. J. If a Child had died Inteſtate without Wife, Child or Father, living only the Mother, the Mother had the whole till 1 *Jac.* 2. excluſive of the Brothers and Siſters; and there muſt be the ſame Law now, as to the Grandmother with Relation to the Aunts; the Father ſurviving has the Child's whole Eſtate at this Day.

Cheſhire: No *Mandamus* ought to go, at leaſt till the Court have erred, for this Court will not anticipate the Judgment of the Spiritual Court.

Holt C. J. Before the Statute of *Ed.* 3. the Ordinary having the Power of Diſtribution, uſed to diſpoſe of Part among the Relations, and the other Part to Charities; but that Statute took away ſuch Right from the Ordinary, and (*a*) fixed the Title to the perſonal Eſtate in the Adminiſtrator. And before the 22 & 23 *Car.* 2. the Ordinary could not (*b*) compel the Adminiſtrator to make Diſtribution, but was from Time to Time prohibited. I would fain know how it comes to paſs, that the Spiritual Court have not purſued the ancient Civil Law, but have varied that by the Novels?

(*a*) Ante 43.

(*b*) 1 Lev. 233, and in *Edwards* verſus *Freeman*, Vol. 2. 441.

Dr. *Lane:* Before the Novels were introduced, the Courts proceeded by the Rules of the Cuſtomary Law, and afterwards were never intirely directed by the Novels, which were not introduced till the thirteenth Century: And as to the Canons, there are ſome of them which expreſly give the Preference to the Grandmother before the Brothers and Siſters of the Inteſtate; and it was the Mercy of the Civil Law, to let in the Brothers and Siſters.

Chief Juſtice: The Statute of 1 *Jac.* 2. allowed the Proceedings of the Spiritual Court to be right, as the Law then ſtood, but thought it unreaſonable that the Mother, (who might marry again) ſhould carry away all; and therefore the Parliament let in the Inteſtate's Brothers and Siſters equally with the Mother; but ſtill the Father has all. If the Spiritual Court, ſince the Statute of *Car.* 2. ſhall attempt a Diſtribution, contrary to the Rules of the Common Law, we will prohibit them; for by that Statute they are reſtrained to the Rules allowed among us.

Afterwards, in *Hill.* Term following, it was reſolved *per tot' Cur*, that a *Mandamus* ſhould not be granted, and *Holt* C. J. delivered the Reaſons:

How the Law ſtood formerly with Regard to Diſtribution and Inheritance.

The Laws of *England*, and not any foreign Laws, ought to govern this Caſe. It muſt be obſerved, that by the ancient Laws here, both before and at the Conqueſt, all the Deſcendants, Sons and Daughters in general, did inherit as well the real as perſonal Eſtate of the Anceſtor (*a*) equally, and in a like Proportion; and ſo it appears in *Selden*'s *Eadmerus* 184. *Lambard*'s *Saxon Laws* 36. *fo.* 167. *Si quis inteſtatus obierit, liberi ejus hæreditatem equaliter dividant, &c.* But in Proceſs of Time new Laws were introduced; and the Change ſeems to have begun *tempore Henrici primi*, when the Females, in caſe there were Males, were excluded from the Inheritance of the real Eſtate; but the Males inherited equally all the Socage Lands. *Glanvile, lib.* 7. *cap.* 3. But at that Time, if a Child died without Iſſue, the Land went to the Father or Mother, in Preference to any of the Collateral Line; as you may ſee in *Lambard* 202, 203. *inter leges Henrici primi, cap.* 70. *Si quis ſine liberis deceſſerit, pater, aut mater ejus in hæreditatem ſuccedat, vel frater & ſoror, ſi pater & mater deſint; ſi nec hos habeat, ſoror patris vel matris, & deinceps qui propinquiores in parentelâ fuerint, & dum virilis ſexus extiterit, & hæreditas abinde ſit, Fœmina non hæreditet.* And this Law is cited by Lord *Coke* in his Comment on *Littleton, fo.* 11. where he ſays, he never read an Opinion in any Book old or new, (*Lambard* was not then publiſhed) againſt the Maxim, that Inheritances cannot lineally aſcend; but only *in libro Rub', cap.* 70. which Record in the Exchequer is notwithſtanding of great Authority even at this Day. But this Law of Succeſſion did not continue long, being altered betwixt the Times of *H.* 1. and *H.* 2. when the Father and Mother were excluded, and the Inheritance carried over to the Collateral Line, as appears by *Glanv. lib.* 7. *cap.* 1, 2, 3, 4.

(*a*) See Hale's Hiſtory of the Common Law p. 220. and in *Clements* verſus *Scudamore*, 64.

However, this Alteration of the Deſcent was made only as to the real Eſtate, and did not extend to the perſonal Eſtate; for as to that, the Father and Mother had always the Preference before the Brothers and Siſters, which is a plain Demonſtration that they were eſteemed nearer of Kin. *Vide* 1 *Vent.* 414. And then, by the like Reaſon, the Grandmother muſt be preferred before the Aunt.

I admit, that new Laws were introduced in the latter End of *Juſtinian*'s Reign, but they were ſuch as had been in ancient Practice in the *Prætorian* Court, (*viz.*) the (*a*) Brothers and Siſters were let in to ſhare with the Father and Mother; but all other Collaterals more remote were excluded; and the Grandfather and Grandmother were preferred before the Uncles and Aunts. It appears from *Ridley*'s View of the Civil Law, (*Page* 63.) that the Grandmother, *&c.* of the aſcending Line, to the utmoſt Degree, was anciently preferred before the neareſt Collaterals; but that may now be altered by the Statute of *Car.* 2. which prefers the next of Kin, tho' Collateral, before one tho' Lineal that is more remote.

But, in our Caſe, the Grandmother is nearer of Kin to the Inteſtate than the Aunt; for the Aunt is not of Kin to the Inteſtate, but as ſhe derives her Kindred from the Grandmother her Mother, and therefore not in equal Degree; beſides, where one is lineal and the Cauſe of the Kin, and the other collateral, the Perſon who is lineal ſhall be preferred: here the Grandmother is the Root of the Kindred, and ſo muſt be nearer than they that derive their Relation from her.

This Rule of Succeſſion in the aſcending Line is agreeable to the Laws of other Nations; for by the

conſtant

(*a*) But ſuch Brothers and Siſters muſt have been of the whole Blood, or *ex utriſque parentibus conjuncti.* Hale's Hiſtory of the Common Law 213.

(a) Hale's Hiſtory of the Common Law 209.

conſtant Practice of the *Jewiſh* (a) Nation, for want of Iſſue of the Son, the Father ſucceeded to the Purchaſe of the Son, excluding the Brother, according to the Conſtruction of the *Jewiſh* Doctors upon the xxvii Chapter of *Numbers*. As you find it in *Selden, De Succeſſionibus apud Hebræos, cap.* 12. And indeed by all Laws, (excepting that of *Juſtinian*,) the Father was preferred to the Brother; but our Caſe falls not within the Reaſon of *Juſtinian*'s Law; tho' if it did, the Civil Law obliges us here, only as it has been anciently received, and it could not have been received *tempore Henrici primi*, who lived about the Year of our Lord 1100. for that the Works of *Juſtinian* were firſt * publiſhed about *Anno Dom'* 560. and were practiſed about forty Years; after which they were totally neglected in the Empire for 500 Years, and new Laws were ſet up by the Emperor *Baſilius*, which were followed till the taking of *Conſtantinople*, *Anno* 1453. and till the Year 1125. (which was the 25 *H.* 1.) the Laws of *Juſtinian* were not again heard of: But about that Time were found by *Lothar* at the taking of *Amalſi*, and

---

* The Works of *Juſtinian* were publiſhed in the following Manner, *viz.* The *Code* was the firſt Book which the Emperor *Juſtinian* ordered to be collected (for the moſt part) out of the Conſtitutions of the former Emperors diſperſed in the *Gregorian*, *Hermogenian*, and *Theodoſian Codes.* There are only ſome Fragments left of the two firſt, but the *Theodoſian* is intire: This Work, tho' firſt ſet about, did not come out till the Year 534. 2. The *Digeſt* or *Pandects* came forth in the Year 533. and is divided into fifty Books; it is collected from the Commentaries of the ancient Lawyers, their *Reſponſes*, and other Writings. 3. The *Inſtitutes* came out alſo in the Year 533. and are divided into four Books; they are a Syſtem of the whole Body of the Law, but not ſo diſtinct and comprehenſive as it might be, neither ſo uſeful at this Day as at firſt; the Inſtitutes ſometimes correct, or are contrary to the Digeſt. But the ſecond Publication of the *Code* came out after them, in which ſome Things are omitted which the Inſtitutes refer to from the firſt Publication. Laſt of all the *Novels* or *Authenticks* were publiſhed at ſeveral Times without any Method; they are called *Novels* becauſe they are *new* Laws; and *Authenticks*, becauſe they are tranſlated exactly and *authentically* from the *Greek* Tongue. Vide Wood's Inſtitute of the Civil Law, in the Introduction, p. 5 & 6.

and were publiſhed at the Univerſity of *Bologna*; as appears by Mr. *Selden*'s Notes on *Forteſcue*, *cap.* 18, 19. *Selden of Tithes* 490. and alſo in a (a) Treatiſe *de uſu & authoritate Juris Civilis Romanorum*, by Dr. *Duck*, who was reputed to be an eminent and learned Civilian.

(a) Lib. 1. cap. 5.

So *per tot. Cur.* a *Mandamus* was denied.

Grandfather on the Father's Side, and Grandmother on the Mother's Side equally intitled by the Statute of Diſtributions.

See the Caſe of *Moor* and *Barham*, 13 *May* 1723. at the Rolls: One died Inteſtate, leaving a Grandfather by the Father's Side, and a Grandmother by the Mother's Side, his next of Kin; theſe (Grandfather and Grandmother) ſhall take in equal Moieties by the Statute of Diſtribution, as being in equal Degree; for tho' the Grandfather by the Father's Side, may, in ſome Reſpects, be more worthy of Blood, yet here Dignity of Blood is not material; in regard the Brother of the (b) Half Blood ſhall take equally with the Brother of the whole Blood; and the Maſter of the Rolls (Sir *Joſeph Jekyll*) was ſo clear as to this Point, that he would not ſuffer it to be debated.

(b) Caſes in Parl. 108. Carth. 51.

DE
Term. S. Hillarii,
1702.

Caſe 10.

Bamfield verſus *Popham*.

Salk. 236. 2 Vern. 427, 440.

No Eſtate raiſed by Implication in a Will can deſtroy an expreſs Eſtate; as where a Deviſe was to *A.* for Life, Remainder to his firſt Son, and ſo to every other Son in Tail Male; and for want of Iſſue Male of *A.* Remainder over: This was no Eſtate-tail in *A.* by Implication. Q. Whether this Caſe be not wrong reported by Salkeld, & vide poſt 754.

THE Caſe in Effect was: *A.* ſeiſed in Fee of the Lands in Queſtion, deviſes them to Truſtees and their Heirs, to the Uſe of them and their Heirs, in Truſt for the Defendant *Popham* for Life, with Remainder to his firſt, *&c.* Son ſucceſſively in Tail Male, and *for Want of Iſſue Male* of *Popham*, Remainder over.

Afterwards, the Teſtator by a *Codicil*, reciting that he had by his Will given the Premiſſes to *Popham*, and the *Heirs Male of his Body*, now he wills, that if that Eſtate ſhould determine, and *Popham* ſhould die *without Iſſue Male*, then his Eſtate ſhall be diſpoſed of in ſuch Manner, *&c.*

Popham had no Iſſue Male, and on the Remainder-man's bringing a Bill to ſtay Waſte, the Queſtions were, 1*ſt*, Whether the Words of the Will, (*ſcil.*) *for Want of Iſſue Male of Popham*, did not by *Implication* give an Eſtate-Tail to *Popham*, and conſequently render him diſpuniſhable for Waſte? Or,

Secondly, Whether (admitting the Words in the Will did not give an Eſtate-Tail) the Codicil, reciting that the Teſtator had by his Will deviſed the Premiſſes to *Popham* and the *Heirs Male of his* Body, would not ſo far influence and explain the Will, as to make it an Eſtate-Tail, though it were not ſo before?

And this having been argued already in Chancery, came now to receive a ſolemn Determination before Lord Keeper *Wright*, C. J. *Holt*, C. J. *Trevor*, Sir *John Trevor*, Maſter of the Rolls, and *Powell* J. who all gave their Opinions *ſeriatim*, That *Popham* had only an Eſtate for *Life* by the Will, and that the ſame was not enlarged or altered by the *Codicil*.

Firſt, They all reſolved, that here being an expreſs Eſtate given to *Popham* for Life, with Remainder to his firſt and every other Son, *&c.* the Words [if *Popham* ſhould die without Iſſue Male] ſhould not enlarge this Eſtate to an Eſtate-Tail; in regard theſe amounted only to make an Eſtate-Tail by Implication; and Words of Implication would never deſtroy what was before expreſſed (*a*); ſo that the Words [if he ſhould die without Iſſue Male] could mean no more, than if he ſhould die without *Sons*.

And though it might be objected, that unleſs theſe Words were conſtrued to create an Eſtate-Tail in *Popham*, then a *poſthumous* Son would not take, which would be contrary to the Intention of the Teſtator:

The Anſwer was, that notwithſtanding it might have been intended that ſuch *poſthumous* Son ſhould take, yet the Teſtator was herein miſtaken as to the Law,

(*a*) Ante p. 21.

Law, or might not conſider of it; and this was but a remote Miſchief or Contingency; whereas it was very obvious, that the Teſtator intended it ſhould not be in the Power of *Popham* to bar the Remainders, which it was plain he could do, if he had an Eſtate-Tail; ſo that this being a Miſchief near and eaſy to be foreſeen, it was certainly in the Intent of the Teſtator to obviate and prevent the ſame; and it was a Maxim in Law equally certain, that where there is an expreſs Eſtate limited, no Implication (*a*) ought to be admitted to control it; *Expreſſum facit ceſſare tacitum.*

(*a*) Poſt p. 78, 333.

Et per Trevor C. J. In the Caſe of (*b*) *Penhay* verſus *Hurrel* it was held, that if there be *Ceſtuy que Truſt* for Life, Remainder to his firſt, &c. Son in Contitigency, the *Ceſtuy que Truſt* for Life cannot deſtroy the contingent Remainders: And the Deviſe in the principal Caſe being by way of *Truſt*, that may ſupport the Right of a *poſthumous* Son: But to raiſe an Eſtate by Intention or Implication, contrary to what is before expreſſed, is to ſay, a Man thinks differently from what he ſpeaks, which is unnatural and unreaſonable. It is true, if I deviſe an Eſtate to *A.* for Life, Remainder to the Heirs of his Body, in this Caſe, notwithſtanding the expreſs Eſtate for Life, yet the ſubſequent Words do merge and deſtroy it, by turning it into an Eſtate-Tail; but the Reaſon is, becauſe here ſuch ſubſequent Words are expreſs Words; *Heirs of his Body* are expreſs Words of Inheritance, and a Limitation in Tail; which is an Anſwer to the Objection from *Lewis Bowles*'s Caſe, (11 *Co.* 80.) for there alſo we find an expreſs Limitation in Tail: But in the principal Caſe, the Raiſing an Eſtate-Tail by Implication would contradict the expreſs Limitation, and conſequently the Intent of the Teſtator.

(*b*) 2 Vern. 370.

As to *Sunday*'s (*a*) Caſe in 9 *Co.* 127. *b.* there was a Deviſe to *A. generally*, (expreſſing no Eſtate) and if *A.* ſhould have no Iſſue Male, Remainder over, which, for that Reaſon, was rightly adjudged an Eſtate-Tail.

(*a*) Poſt. in *Blackbourn* verſus *Hewer Edgley*, 605. & e contra.

Powell J. There is no Difference between a Deed and a Will in this Caſe; for if a Man does by Deed give Lands to *A.* without expreſſing any Eſtate, and afterwards adds the Words, If *A.* die without Iſſue, then to *B.* this makes an * Eſtate-Tail. *Perk. ſect.* 173.

As to *Robinſon*'s Caſe cited by Lord *Hale*, 1 *Vent.* 230. *King* verſus *Melling*, if I deviſe Lands to *A.* for Life, and if he die *ſans* Iſſue, then to *B.* as this Caſe is put in *Moor* 682. and 1 *Roll. Abr.* 837. *pl.* 12. it differs from the Caſe put by Lord *Hale*, (*viz.*) no *expreſs Eſtate for Life* is given to *A.* But if it be Law as put by Lord *Hale*, it muſt be upon this Suppoſition, that the Deviſee over was Heir at Law, (*viz.*) One deviſed Lands to *A.* for Life, and if *A.* died without Iſſue, then to his [the Teſtator's] right Heir: Now this might be allowed to be an Eſtate-Tail in *A.* without contradicting the Reſolution in the principal Caſe; for where the Deviſee over was Heir, there muſt have been a moſt neceſſary Implication, that *A.* the firſt Deviſee ſhould have an Eſtate-Tail, becauſe the Heir of the Teſtator was excluded from taking, until the firſt Deviſee died without Iſſue; which Diſtinction ſerves alſo to anſwer *Burley*'s Caſe, put by Lord *Hale* in the ſame Place in *Ventris*.

With regard to the Caſe of *Clark* and *Day*, reported 1 *Roll. Abr.* 839. *pl.* 4. *Moor* 593. *Owen* 148. *Cro.*

---

* But of this the Lord Keeper doubted. And *vide Vaugh.* 259. & ante *Fiſher* verſus *Wigg* contra. But his Lordſhip held, that where in the Premiſſes an Eſtate is given by Deed to one and his Heirs, and if he die without iſſue, *&c.* theſe Words are ſufficient to reſtrain the former Words, and turn the Fee into an Entail, but will not of themſelves create an Eſtate-Tail.

Eliz. 313. where one deviſed Land to his Daughter *Roſe* for Life, and if ſhe married after the Teſtator's Deceaſe, and had Heirs of her Body, that then ſuch Heir ſhould have it after her Death, and the Heirs of their Bodies; and if ſhe ſhould happen to die without Iſſue, then the Teſtator deviſed the Premiſſes to his Daughter *P.* It is indeed ſaid *per Rolle*, that *Roſe* had an Eſtate-*Tail* *, but by *Moor* (with whom Lord *Hale* agreed in *King* and *Melling*'s Caſe) *Roſe* had only an Eſtate for *Life*; thought in the arguing of the Caſe of *King* and *Melling*, the Roll being brought into Court, it appeared that no Judgment was ever entered. In the Caſe of *Loddington* and *Kyme* (*a*) *C. B.* 7 *W.* 3. a Deviſe was to *T. S.* for Life, Remainder to his Iſſue, and if he died without Iſſue, then to another; yet reſolved that *A.* had an Eſtate for *Life* only, in regard the Words were expreſs.

(*a*) 3 Lev. 431. and Salk. 224. in both which Places the Caſe is reported ſtronger than here cited, there being the Clauſe, without Impeachment of Waſte, and alſo Words of Limitation ſuperadded to the Deviſe to the Iſſue.

As to the *ſecond* Point, (*viz.*) whether the Teſtator's Recital in his Codicil, that he had deviſed the Eſtate to *Popham*, and the Heirs Male of his Body, would alter and enlarge the Eſtate given to him by the Will?

It was reſolved, It ſhould not; theſe Words being ſufficiently ſatisfied, though *Popham* had no Eſtate-Tail; for, *ad vulgus*, where an Eſtate is ſettled upon one for Life, Remainder to his firſt, *&c.* Son, this is uſually called *Intailing an Eſtate*; that is, when it is ſo limited as not to be in the Power of the firſt Taker to diſpoſe of it; and every one that is to claim by ſuch Settlement muſt be Heir Male; for the firſt Son after the Death of his Father is Heir Male.

---

* It appears from the Report of this Caſe in *Croke*, that *Gaudy* and *Fenner*, Juſtices, held, *Roſe* had but an Eſtate for Life, againſt the Opinion of *Popham* C. J. who thought ſhe had an Eſtate-Tail.

But if it were not ſo, and the recital falſe in this Reſpect, yet, *per Holt* C. J. a falſe Recital in a Will ſhall not amount to a Deviſe. As in 2 *Ventris* 56. *Wright* verſus *Wyvell*, one by Will recited, that he had given an Eſtate to his Wife for her Jointure, whereas in Truth he had not; and reſolved, that the Will did not amount to a Deviſe, nothing being intended to paſs thereby.

Thirdly, It was agreed likewiſe, that the Word [Heir] was not always and of Neceſſity to be intended as a Word of *Limitation*; thus in 2 *Vent.* 311. *Burchett* verſus *Durdant*, a Deviſe to *A.* for Life, Remainder to the Heirs Male of the Body of *A.* now living, theſe were Words of *Purchaſe*: So in *Raym.* 278. 2 *Jones* 114. *Liſle* verſus *Grey*. Lands were limited to *A.* for Life, Remainder to his firſt and every other Son in Tail, and ſo ſeverally and reſpectively to every of the Heirs Male of the Body of *A.* and the Heirs Male of the Bodies of ſuch Heirs Male; in this Caſe the Words [Heirs Male] were underſtood to ſignify *Sons*, and to be Words of *Purchaſe*.

Upon which, the Court decreed an Injunction to ſtay Waſte; and an Account to be taken of what Timber had been already felled.

Vide the Caſe of *Langley* verſus *Baldwin*, referred *May* 1707 out of Chancery to the Judges of *C. B.* and how that differed from the Caſe above; foraſmuch as the Limitation there being not to all the Sons of the Grandſon, if there had been more than ſix, and the ſix had died without Iſſue Male, unleſs it had been conſtrued to be an Eſtate-Tail in the Grandſon, the Remainder-man muſt have had the Lands in Preference to a ſeventh Son. *Vide* alſo poſt *Attorney General* verſus *Sutton* and *Payman*.

DE
Term. S. Michaelis,
1702.

Caſe 11.
Lord Keeper Wright *and Maſter of the Rolls.*

A voluntary Conveyance made to the Brother by the Half Blood, but which was void and defective at Law, made good by a Court of Equity, againſt the Heir.

Watts verſus *Bullas*.

J. *S.* made a voluntary Conveyance to his Brother by the half Blood, which was void and defective at Law; afterwards *J. S.* died without Iſſue, upon which the Brother (who by Reaſon of the Half Blood could not be Heir to *J. S.*) brought his Bill againſt the Heir, to compel him to make good this Conveyance.

For the Defendant it was objected, that this being a voluntary Conveyance, it ought not to be made good in Equity, eſpecially againſt an Heir at Law.

But Lord Keeper was of Opinion, that as the Conſideration of Blood would at Common Law raiſe an *Uſe*, and as before the Statute of 27 *H.* 8. ſuch *Ceſtui que Uſe* ſhould have compelled an Execution of the Uſe in a Court of Equity; ſo would this imperfect Conveyance raiſe a *Truſt*, in reſpect of the Conſideration of Blood, and conſequently ought to be made good in Equity.

And it being ſaid by Mr. *Pooley*, that though a Conveyance to younger *Children* would, if void at Law, be made good in Equity; yet it had been decreed in the Houſe of Lords, that they would not ſupply the Want of a Surrender in Caſe of a Deviſe of a Copyhold to *Grandchildren*; and by the ſame Reaſon Equity ſhould not regard the Relation of a *Half-Brother*:

To this the Maſter of the Rolls anſwered, that it was his Opinion, ſuch a Deviſe of a Copyhold, without a Surrender, ought to be made good for *Grandchildren*, as well as *Children*; and if the ſame Caſe were to come *now* into the Houſe of Lords, it would be ſo ruled *, and that he had, and would decree it ſo.

So would the want of a Surrender, in Caſe of a Deviſe of a Copyhold to Grandchildren.

* The like was alſo declared *per* Lord *Harcourt* in the Caſe of *Freeſtone* verſus *Rant* (*Trin.* 1712.) And it is obſervable, that the Caſe of *Kettle* and *Townſend* (here referred to by Mr. *Pooley*) being cited before Lord *Cowper*, in the Caſe of *Furſaker* verſus *Robinſon*, (*Mich.* 1717) his Lordſhip doubted thereof, in regard the *Grandfather*, by the Act 43 *Eliz.* for maintaining the Poor, is bound to maintain his *Grandchild*; which he ſaid, he believed was not taken Notice of in that Caſe.

White verſus *Nutt*.

Caſe 12.

ONE by Articles, reciting that he had an Eſtate for two Lives in a Church Leaſe, covenanted to convey his Title to the Premiſſes by ſuch a Day, to *J. S.* as *J. S.* or his Counſel ſhould adviſe.

On Caſualties happening between the Articles for a Purchaſe and the Sealing of the Conveyance, who ſhall bear the Loſs.

It happen'd, that after the Articles, and before the Time appointed for the Conveyance, one of the Lives dropt. And the Queſtion being upon whom the Loſs ſhould fall?

It was decreed *per Lord Keeper,* That in regard here was no Default in the Seller in making the Conveyance; the Loſs of the Life ought to be born by the Purchaſer, in the ſame Manner as if the Reverſioner had articled to ſell the Reverſion expectant upon two Lives, and one of them had died before the Conveyance, the Purchaſer ſhould there have had the Benefit of it; and in each Caſe, in Equity, the Eſtate is as conveyed from the Time of the Articles ſealed.

But his Lordſhip ſeemed to think, that if *all* the Lives had dropt before the Execution of the Conveyance, it might have been another Conſideration, for that the Money was to be paid upon the Conveyance, and no Eſtate being left, there could be no Conveyance.

Quer. tamen the Reaſon of this Diſtinction between the Loſs of Part and of the Whole, & *vide* the Caſe of *Caſs* verſus *Rudele & al'*, 2 *Vern.* 280.

DE

DE
Term. S. Hillarii,
1703. *B. R.*

Clements verſus *Scudamore.*

Caſe 18.

Salk. 243.
6 Mod. 120.

IN Ejectment the Jury found this ſpecial Verdict: *J. S.* had Iſſue five Sons, the youngeſt of which died in the Life-time of *J. S.* leaving Iſſue a Daughter, (the Leſſor of the Plaintiff) after which *J. S.* purchaſed the Lands in Queſtion, which were Copyhold, and of the Nature of *Borough-Engliſh*, deſcendible by the Cuſtom to the *youngeſt Son and his Heirs*; *J. S.* died ſeiſed, and the fourth Son entred; upon which the Queſtion was, whether the fourth Son, or the Daughter of the fifth Son ſhould inherit theſe Lands? And after ſeveral Arguments at Bar,

One ſeiſed of a Copyhold in Fee in Nature of *Borough-Engliſh* has five Sons, the youngeſt of whom dies in the Life of the Father, leaving Iſſue a Daughter, and then the Father dies; the youngeſt Son's Daughter is inheritable.

C. J. *Holt* delivered the Opinion of the whole Court in Favour of the Daughter, (*viz.*) That ſhe ought to inherit theſe Lands *Jure repræſentationis.*

Wherever this Cuſtom has obtained, the youngeſt Son is there placed in the Room of the Eldeſt, who inherits by the Common Law; and there is no Diffe-

The youngeſt Son by *Borough-Engliſh*, and his Repreſentatives, are as much Heirs to the *Borough-Engliſh* Lands, as an eldeſt Son or his Repreſentatives are Heirs to Lands deſcendible at Common Law.

rence in the Courſe of Deſcents, but that the Cuſtom prefers the youngeſt Son, and the Common Law the Eldeſt; and therefore, as by the Common Law the Iſſue of the eldeſt Son, Female as well as Male, do, *Jure repræſentationis,* inherit before the other Brothers, ſo by the ſame Reaſon, when this Cuſtom has transferred the Right of Deſcent from the eldeſt to the youngeſt Son, it ſhall alſo, by the like Repreſentation, carry it to the Daughter of the youngeſt Son: And there is no Ground to make any Difference betwixt a Deſcent by this Cuſtom, and by the Common Law.

All Lands in *England*, before the Conqueſt, were in Nature of Gavelkind, and deſcendible to all the Iſſue equally; and when the Introduction of Tenures and Knights-Service had made ſeveral Alterations, yet the Right of Repreſentation continued.

Tho' Lord *Coke* be of another Opinion, yet it appears from the beſt Authors, as *Lambard's Saxon Laws, inter Leges Gulielmi* 1*mi*, 36. *fo.* 167. and *Selden in Eadm.* 184. That all the Lands in *England* were at firſt, and before the Conqueſt, in Nature of (*a*) Gavelkind, and deſcended equally to all the Iſſue; but this was ſoon afterwards altered, when Tenures by Knights-Service were introduced for the Defence of the Realm; for then, in order the better to preſerve the Family and Tenure, the Deſcent was reſtrained only to the eldeſt Son; but yet, notwithſtanding this Alteration, the Right of Repreſentation continued to take place; and by the Common Law, if the eldeſt Son happened to die in his Father's Life-time, leaving Iſſue a Daughter, the Inheritance deſcended to her in Preference to any of the other Sons, ſo that the Female, by Way of Repreſentation, was yet preferred to the Males, becauſe the Right of Repreſentation was not altered.

(*a*) Vide in *Blackborough* verſus *Davis*, p. 50.

Right of Repreſentation obſerved in Scripture.

This Right of Repreſentation is not peculiar to the Laws of *England*, but has prevailed by the Laws of *other Countries*; as may be ſeen in (*b*) *Numb. Chap.* xxvi. *v.* 33. and *Chap.* xxxvi. For tho' by the *Jewiſh* Law, the Males inherited excluſively of the Females, and the eldeſt Son had a double Portion of his Father's Eſtate, which

(*b*) Hale's Hiſtory of the Common Law, p. 210.

which was confined to him as the firſt Begotten, yet we find when *Zelophehad* the Son of *Hepher* died, leaving no Sons but *Daughters*, and the Daughters came unto *Moſes* claiming the Poſſeſſion of their Father, this being a new Caſe, *Moſes* is ſaid to have brought their Cauſe before the Lord, who commanded him to give them the Poſſeſſion of their Father; ſo that it was here determined, that they ſhould take the double Portion that belonged to their Father, as the eldeſt Son, *by Right of Repreſentation.* So is *Selden de Succeſſionibus apud Hebræos, cap.* 23.

The ſame Law was Part of the twelve Tables, and from thence came to be obſerved among the *Romans*; and here in *England*, the Right of Repreſentation holds as well in caſe of Inheritances deſcendible by Cuſtom, as by the Common Law. So in the Caſe of *Gavelkind* Lands, where the Cuſtom in Pleading is thus ſet out; (*Raſt. Cuſt.* 143. *a.*) *quod terræ & tenementa de tenurâ de* Gavelkind *de tempore, &c. inter hæredes maſculos partibilia, & partita fuerunt*; and yet if a Man ſeiſed of *Gavelkind* Lands has Iſſue three Sons, one of which dies in the Life of his Father, leaving Iſſue a Daughter, and afterwards the Father dies, there can be no Doubt, but that this Daughter ſhall inherit the Purparty of her Father, tho' ſhe be not within the *Words* of the Cuſtom, (*ſcil.*) That the Lands are partible *inter Hæredes maſculos*; but the Cuſtom, by Conſtruction, ſhall extend to Daughters, *Jure repræſentationis.* And there is no Difference between the Cuſtom of *Gavelkind* and this of *Borough-Engliſh*, only in Reſpect of the Quantity of the Land which the Heir takes; there each Son taking an equal Part, but here the youngeſt takes the whole, which will not vary the Reaſon in Conſtruction of the Cuſtom.

In Caſe of Gavelkind Lands, if one of the Sons die in the Life of the Father, leaving a Daughter, and after the Father die, the Daughter ſhall have her Father's Share.

The Cuſtom is, that the Copyhold Lands of any Tenant dying ſeiſed ſhall deſcend to his youngeſt Son, and a Surrender is made of a Copyhold to the Uſe of *J. S.* and his Heirs, who dies before Admittance, his eldeſt Son, and not his youngeſt, ſhall take theſe Lands; *ſecus* if the Land had been laid to have been of the Nature of *Borough-Engliſh.*

(*b*) This ſeems to be the ſame Caſe that is cited in 2 Keb. 158, 159, under the Name of *Pain* verſus *Herbert.*

The Common Law takes Notice of theſe Cuſtoms of *Gavelkind* and *Borough-Engliſh*: And there is a very remarkable Caſe adjudged in Lord *Bridgman*'s Time, which is not reported in any printed Book; it was in the Years 1660, 1661, *Intrat': Hill.* 1655. *Rot.* 779. *C. B. inter* (*b*) Hale *and* ——, where the Caſe was, That the Copyhold Lands of every Tenant *dying ſeiſed*, were by the Cuſtom of the Manor deſcendible to the youngeſt Son, and a Surrender was made to the Uſe of *B.* and his Heirs, who died *before Admittance*: It was agreed, if *B.* had been admitted, the youngeſt Son, after his Death, ſhould have inherited; but in regard *B.* died before Admittance, the Queſtion was between the eldeſt and youngeſt Son of *B.* who ſhould have the Land? and adjudged, that in this Caſe, the *eldeſt Son* ſhould have the Land, becauſe of the *Straitneſs* of the Cuſtom, and there never having been any Seiſin in the Anceſtor; but, by *my Report* it would have been *otherwiſe*, had it been alledged that the Lands were in the Nature of *Borough-Engliſh*, which it was not, but only ſet forth as a particular Cuſtom; for the Law takes Notice of the Cuſtom of *Borough-Engliſh*, but not of this ſpecial Cuſtom; which is likewiſe the Reaſon, why in Pleading that Lands are of the Nature of *Borough-Engliſh*, you need not ſet forth the Nature of the Cuſtom ſpecially.

This Caſe ſeems at firſt to be *againſt* me; but the *Reaſon* of the Diſtinction there taken is on *my Side*; in the preſent Caſe, the finding of the Cuſtom does not exclude the Daughter, but on the contrary expreſly comprehends her; for it is found, that the Lands are deſcendible to the youngeſt Son and *his Heirs*; tho' without that expreſs Mention of his Heirs the Daughter ſhould have inherited. Now this Cuſtom is not to be taken ſtrictly, and according to the

Letter, but ſhall receive ſuch Conſtruction as may comprehend neceſſary Conſequences and Incidents in Courſe of Deſcents; and therefore, tho' the Father be *diſſeiſed* and die, ſo that he is not ſeiſed at the Time of his Death, yet the Right of Entry ſhall deſcend to his youngeſt Son; and tho' the Son die before any Entry, yet, without Doubt, the Right will go to the Daughter, notwithſtanding the Son could not be ſaid to have *died ſeiſed*, within the Words of the Cuſtom.

One ſeiſed of *Borough-Engliſh* Lands is afterwards diſſeiſed, yet the Right to the Lands ſhall deſcend to the youngeſt Son.

So in this Caſe, if a Deſcent be caſt, the youngeſt Son ſhall have his Age, as much as if he were Heir at Common Law; and there is no reaſon why the Repreſentative of the youngeſt Son, (*viz.*) the Daughter, ſhould not be included within the Meaning of the Cuſtom.

In the Caſe of *Reeve* verſus *Malſter*, 1 *Rol. Ab.* 624. *pl.* 1. 1 *Jones* 361. *Cro. Car.* 410. The Cuſtom of the Manor was, that if any Perſon died ſeiſed *in Fee-ſimple* of Lands within the Manor, the ſame ſhould deſcend *filio juniori hujuſmodi tenentis cuſtomarii ſic obientis ſeiſiti, ſecundum naturam de* Borough-Engliſh; and a Tenant of the Manor being ſeiſed in Fee, ſurrendred his Lands to the Uſe of himſelf and his Wife, and his Heirs; afterwards he had Iſſue three Sons, and died ſo ſeiſed *of the Reverſion*, and afterwards the youngeſt Son died in the Life-time of the Mother, without Iſſue, and then the Mother died: Upon which the Queſtion being, whether the *eldeſt*, or *middle* Son ſhould inherit? the Judges were thereupon divided. *Barkeley* and *Brampſton* held, that the *middle* Son ought to have the Land; but *Jones* and *Crook* were of Opinion for the *Eldeſt*.

Now I obſerve, that there the Cuſtom was more *ſpecial* than in our Caſe, it not being, that if a Man died ſeiſed *generally*, the Lands ſhould deſcend to his youngeſt Son; but if he died ſeiſed *ſpecially*, (*ſcil.*) in *Fee-ſimple.* Tho' in that Caſe *Jones* and *Crook* declared it as their Opinion, that if the Father had been diſſeiſed and died, the youngeſt Son ſhould not have inherited; which makes it ſeem leſs ſtrange, that they ſhould exclude the middle Son when the Cuſtom was ſo *ſpecial*; for the Father did not die ſeiſed of the *Fee-ſimple*, but of the *Reverſion.* But let that Caſe remain undecided, the Cuſtom there differs from ours.

It was objected by Mr. *Weld*, (who argued on the Part of the Defendant) that whoever takes by Deſcent muſt make himſelf Heir to him who was laſt ſeiſed; and the Daughter cannot make herſelf Heir to the Grandfather.

But in Anſwer to that, it muſt be here intended, that ſhe is to make herſelf Heir to him who was laſt ſeiſed *according to the Cuſtom*; and if the Cuſtom extends to her, ſhe is then Heir to her Father or Grandfather laſt ſeiſed; and as the Daughter of the eldeſt Son at Common Law, *Jure repræſentationis*, makes herſelf Heir to her Grandfather, ſo the Daughter of the youngeſt Son here makes herſelf Heir to her Grandfather by the Cuſtom.

The Caſe of *Godfrey* verſus *Bullock*, 1 *Rol. Abr.* 623. *pl.* 3. is a full Authority for me: There the Cuſtom was, that if a Man died without Heir Male, his eldeſt Daughter ſhould have his Lands; and the Tenant had no Heir Male, but had Iſſue ſeveral Daughters, the eldeſt of whom had Iſſue a Daughter, and died in the Life-time of her Father; adjudged this Grandaughter was within the Cuſtom, and ſhould have the Lands by Deſcent upon the Death of the Grandfather. Now by the Common Law, the eldeſt Daughter has not the Preference before the Reſt, but all inherit equally; yet

Cuſtom may give the Inheritance to the eldeſt Daughter, and then her Iſſue ſhall take it *Jure repræſentationis.* This is as ſtrong as a Deſcent in *Borough-Engliſh.*

But the Caſe of Sir *John Savage*, 2 *Leon.* 109, 208. is objected; and there the Cuſtom was, that if a Man took to Wife a cuſtomary Tenant of the Manor, and had Iſſue, and over-lived her, he ſhould be Tenant by the Curteſy; and one married a Woman to whom a cuſtomary Tenement did deſcend during the Coverture, and had Iſſue, and ſurvived her; yet it was adjudged, that he ſhould *not* be Tenant by the Curteſy, becauſe the Woman was not a cuſtomary Tenant at *the Time of the Marriage*, and ſo not within the Cuſtom, which (ſays the Book) was to be taken *ſtrictly*.

Now admitting that Caſe to be Law, it doth not affect ours; for there is a *particular* Cuſtom giving the Eſtate to the Huſband, under *particular Qualifications*: Here the Cuſtom alters the Deſcent by the Common Law to the eldeſt Son, and carries it to the youngeſt Son *generally*, and muſt have all the Conſequences of a Deſcent; only with the Difference as to the Perſon. This Expoſition of the Cuſtom will tend to quiet and ſettle Eſtates and Titles, by introducing the ſame uniform Rules of Deſcent in all Caſes; whereas if *Jones* and *Croke*'s Opinion were to prevail, it could not but occaſion *Uncertainty*, and conſequently *Confuſion*.

Judgment for the Plaintiff *per tot' Cur'*.

Memorandum: Upon the firſt Argument, both *Holt* C. J. and *Powell* J. denied Sir *John Savage*'s Caſe to be Law.

DE

Term. Paſchæ,

1705.

Caſe 14.

Idle verſus *Cook*.

Salk. 620.

Surrender of a Copyhold to the Uſe of Baron and Feme for their Lives, & *hæredum & aſſignatorum* of the ſaid Baron and Feme, and for Default of ſuch Iſſue, to the right Heirs of *A.* this is an Eſtate in Fee, and not an Intail in the Baron and Feme; otherwiſe had it been the Caſe of a Will.

IN Ejectment, on a long Special Verdict, the Caſe was, but this: *Zachariah Cliff* was ſeiſed in Fee of the Lands in Queſtion, being Copyhold Lands, and ſurrendered the ſame *ad opus & uſum prædict' Zachariæ* for his Life; and after his Deceaſe, to the Uſe of *Valentine Cliff* his eldeſt Son, and *Alice* his Wife, *pro & durante termino vitarum ſuarum, & hæredum & aſſignatorum prædictorum Valentini & Aliciæ, & pro defectu talis exitus,* to the Uſe of the right Heirs of *Zachariah* for ever.

Not long after, *Zachariah* was admitted and died; and the Queſtion was, whether this Eſtate limited to *Valentine* and *Alice* his Wife, was an *Eſtate-Tail* only, or a *Fee-ſimple?* If a Fee-ſimple, then Judgment was to be given for the Defendant: Accordingly Judgment was given for the Defendant by three Judges againſt *Gould* J. the Caſe having been thrice argued, and the Court for ſome Time divided.

Gould J. I am of Opinion, that the Eſtate limited to *Valentine* and *Alice* is a *Fee-Tail.*

The Reſolution in the Caſe of *Abraham* (*a*) verſus *Trigg*, cited in *Beresford*'s Caſe, 7 *Co.* 41. *b.* which ſeemed at firſt to be againſt me, was the only Matter that ſtuck with me; but I ſhall ſhew wherein that differs from the preſent Caſe; I am ſure I have the Intention of the Surrenderor on my Side. It muſt be agreed, that the Words [*de corpore*] are not preciſely neceſſary to the Creation of an Eſtate-Tail; it is ſufficient that there are other Words tantamount; and I agree that there is no Difference, in Point of Conſtruction, between Limitations of Eſtates out of Freehold and Copyhold Lands. In this Limitation here is the Word [Heirs] and it is further explained *what Heirs* are meant (*ſcil.*) of *Valentine* and *Alice*; and though the Words be in the *Genitive* Caſe (*ſcil.*) *Hæredum prædictorum Valentini* & *Aliciæ*, yet they import the ſame as if they had been limited in the *Ablative* Caſe, with the Prepoſition *de*, (*viz*) *Hæredum* de *prædict' Valentino* & *Aliciâ*; and then the laſt Words aſcertain what Heirs, (*ſcil.*) ſuch Iſſue of *Valentine* and *Alice.*

(*a*) Moor 424. Cro. Eliz. 478.

The Reſolution of *Beresford*'s Caſe is very ſtrong for me; and that Limitation, upon Compariſon, has no more Words in it than are in our Caſe; the Words [ſuch Iſſue] reſtrain it to the Heirs of *their two Bodies*, and do not extend to the Heirs of the Survivor. *Beck*'s Caſe in *Littleton's Reports* 159, 253, 285, 315. and alſo reported in *Cro. Car.* 363, 364. by the Name of *Boreton* verſus *Nichols* & *al'*, is an Authority in Point for me; for the Queſtion there was, whether the Limitation was an Eſtate-Tail, or a contingent Fee-ſimple? And it was held an Eſtate-Tail; for if it had been a contingent Fee, the Remainder over had been void.

As to the Caſe of *Abraham* verſus *Trigg*, the Limitation there is not like ours; becauſe there it is to the Uſe of *Gabriel Dormer* and his Heirs Males; not to the Uſe of *Gabriel Dormer* and the Heirs Males of *Gabriel Dormer* aforeſaid, as it is in our Caſe (*ſcil.*) and of the Heirs and Aſſigns of the aforeſaid *Valentine* and *Alice*, as the Difference is agreed in *Littleton's Reports* 347. It is held in *Plowd.* 541. *a.* if a Man make a Feoffment to another, to have and to hold to him and his Heirs, *& ſi contingat* that the Feoffee die without *Heirs of his Body*, that then the Lands ſhall revert, the Feoffee takes only an Eſtate-Tail, the Generality of the Gift being corrected by the ſubſequent Clauſe; ſo is the 19 *H.* 6. 74.

It is objected, that the Word [Aſſigns] imports a Fee-ſimple, becauſe an Eſtate-Tail is *not aſſignable*; and the ſubſequent Words ſhall not control the expreſs Limitation.

Reſp. The Expreſſion of [Aſſigns] does not anſwer the Senſe of the Limitation; for a Man's Aſſigns are included in himſelf, and implied in the Limitation to the Surrenderees before; alſo the ſame Word [Aſſigns] is to be found in *Canon*'s Caſe, 3 *Leon.* 5. and yet that was adjudged but an Eſtate-Tail.

Powis J. I am of Opinion, that the Eſtate is a *Fee-ſimple* in *Valentine* and *Alice*.

It is a conſtant Rule, That in every Creation of an Eſtate-Tail, it muſt appear of *what Body* the Perſons who are to inheriſt, muſt iſſue. This is of the Eſſence of the Eſtate, 1 *Inſt.* 27. and therefore if a Man give Lands to another, to hold to him and his *Heirs Male*, the Donee takes a *Fee-ſimple*, becauſe it is not

limited

limited by the Gift, of what *Body* the Iſſue Male muſt be; whereas thoſe Words in a Deviſe carry an Eſtate-Tail, becauſe of the Intent; but in a Conveyance at Common Law, as this is, the Donor muſt by expreſs Words, give Direction from whoſe Body the Heirs inheritable are to iſſue. *Litt. ſect.* 31. 1 *Inſt.* 27, 28. 27 *H.* 8. 27. *Hob.* 32. 9 *H.* 6. 35. A Gift to a Man & *hæredibus de carne ſuâ*, is an Eſtate-Tail, 33 *Aſſize, pl.* 15. for the Words [*de corpore*] are not ſo ſtrictly required, but that they may be expreſt by Words tantamount: And the Example which the Statute of *Weſtminſter* puts hath not theſe Words [*de corpore ſuo,*] 1 *Inſt.* 20. *b.* but the Words [*de*] or [*ex*] are abſolutely neceſſary to make an Eſtate-Tail. 5 *H.* 5. 6. 3 *Ed.* 3. 743.

The Reſolution in *Beresford*'s Caſe turned upon the Word [*de.*] In our Caſe, the Limitation appears at firſt in *Latin* ready to our Hands in the *Genitive* Caſe; but in *Abraham* and *Trigg*'s Caſe, it was in *Engliſh*, and afterwards turned into *Latin*; and that Caſe was adjudged upon great Deliberation; yet ours is much ſtronger to paſs a Fee-ſimple.

But it is objected, that the Words [ſuch Iſſue] in the ſubſequent Clauſe import *Iſſue of* both *Valentine* and *Alice*.

Reſp. Suppoſe that to be ſo, it ſtill omits of what *Body* that Iſſue is to come, which is the principal Thing; for upon the firſt Clauſe, the Heirs of the Survivor take the Whole; and *They* are ſuch Iſſue, and ſo it remains uncertain of whoſe Body the Iſſue inheritable is to come. It would have been otherwiſe if the Words had been [and for Want of Iſſue of the Survivor, &c.] But here the Words are as general as can be; it was, indeed, the Intent of the Surrenderor in this Caſe to give *Valentine* and *Alice* only an Eſtate-Tail, but then he ought to have made Uſe of proper Words; and there is no Difference in Conſtruction between Copyhold (*a*) and Freehold Lands, as is agreed in the Caſe of *Seagood* verſus *Hone*, *Cro. Car.* 367.

(*a*) See ante *Fiſher* verſus *Wigg*.

But it is objected, that *voluntas donatoris* ought to be obſerved; and here is a Remainder limited over.

As to that, the Will of the Donor to be obſerved, ought to be in *Charta ſua manifeſte expreſſa*, which is not ſo here: But this Point has been already determined in the Caſe of *Harrington* verſus *Smith*, 2 *Sid.* 41, 73, 74. which is our Caſe *in Terminis*, and upon a Surrender too; and although it be not mentioned in the Book whether any opinion was given, yet by the Note which I have of that Caſe, it was then held to be a Fee-ſimple. It will be of dangerous Conſequence to allow a greater Latitude in Limitations of Eſtates-Tail than has heretofore been done.

Powell J. I am of Opinion that the Eſtate limited to *Valentine* and *Alice* is a Fee-ſimple.

The Objection is, that it appears to have been the Surrenderor's Intent to paſs only an Eſtate-Tail. But upon great Conſideration, I cannot perſuade myſelf to comply with that Intent, without doing a greater Injury, by confounding the Nature of Eſtates, and ſetting no Bounds to Limitations; ſo that it will never be known what is an Eſtate-Tail, and what a Fee-ſimple.

A Fee-Tail was a Fee-ſimple (*b*) at Common Law; for there were three Sorts of Fee-ſimples, Abſolute, Qualified, (which was as to Time only, *ſcil.* as long

(*b*) For which Reaſon no Remainder could have been limited upon it. See in *Hayter* verſus *Rod*, p. 366.

as ſuch a Tree ſtood, or as *J. S.* had Heirs of his Body;) and alſo Fee-ſimple conditional, which was limited as to the Heirs inheritable; for it was not a Fee accruing upon Performance of a Condition, (the Donee having an immediate Inheritance, though it is true he had a greater Power over the Eſtate upon the Condition performed,) but upon ſuch Performance of the Condition, he had not an Eſtate deſcendible in any other Manner than before; no Body could inherit, but ſuch Heir as was within the Limitation; but in regard ſome were of Opinion, that at Common Law, the ſecond Huſband ſhould be Tenant by the Curteſy, and the Iſſue by him inheritable, when the Eſtate was originally limited only to the firſt Huſband and Wife and the Iſſue between them; therefore to damn this Opinion was the Statute *De donis* made; upon which Statute the Judges, by Conſtruction, have made two Eſtates out of the Fee-ſimple conditional at Common Law.

The Conſtruction of Limitations muſt be the ſame upon Surrenders as upon Deeds; and though it be otherwiſe in Wills, yet even in theſe, notwithſtanding the Words [Heirs of his Body] were not neceſſary at Common Law; there always ought, however, to be ſome Reſtraint of the general Word [Heirs] to make an Eſtate-Tail, as appears in the Caſe of (*a*) *Herne* verſus *Allen*, *Cro. Car.* 57. for there the Limitation over could not poſſibly take Effect, if the Deviſe were not meant of Heirs Special.

(*a*) Ante in *Nottingham* verſus *Jennings*, p. 24.

Now are here any Words of Reſtriction to an Heir Special? None, that are ſo reſtrictive as to ſhew an apparent Intent in the Surrenderor, that only the Iſſue between *Valentine* and *Alice* ſhould inherit, any more than there were in *Abraham* and *Trigg*'s Caſe, which in my Apprehenſion does not differ from this.

I do not underſtand my Brother *Gould*'s Diverſity; I think *the Heirs of them* and *their Heirs* are the ſame, and the Words [*ſuch Iſſue*] are of no Service; for they are uncertain, and do not determine of whoſe Body; and the Heirs general, in the firſt Part of the Limitation, are ſuch Iſſue; but if the Words had been [*for Want of Iſſue of them,*] it might have been an Eſtate-tail, but all Heirs are Iſſue of ſome Body.

We have gone too far already, in helping the Intention of the Parties in Conſtruction of Limitations; and have made Eſtates ſo uncertain, that Lawyers do not know how to adviſe Purchaſers; I cannot conſent to carry it any further; *Beck*'s Caſe differs from this, and it was not neceſſary, or material, in that Caſe to determine, whether the Eſtate limited were a Fee-ſimple or a Fee-tail; for if the Remainder was contingent, That was ſufficient, and in the mean Time, the Remainder *in eſſe* was executed, and the contingent Remainder never happened; but there were more ſpecial Words in that Caſe, *ſcil.* [Heirs Male of his Body,] and altho' the Limitation to the firſt Son of *James Beck* which ſhould have Heirs Males, *&c.* was only a Deſcription of the Perſon, yet the Words [*ſuch Iſſue*] might likewiſe well enough refer to the Words [*Heirs Males*], which may help the Reſolution; but here are only general Words, and nothing ſpecial to refer ſuch Iſſue unto. The Caſe of *Harrington* and *Smith* cited by my Brother *Powis* is the Caſe in Point.

Holt C. J. I am of Opinion, that as the Words of this Limitation are, the Eſtate limited to *Valentine* and *Alice* is a Fee-ſimple; and that as they ſtand originally upon the Surrender in *Latin*, they cannot be conſtrued to make an Eſtate-tail.

I am ſatisfied, that it was the Surrenderor's Intent to give *Valentine* and *Alice* only an Eſtate-tail; for which Reaſon, I would willingly have conſtrued it ſo; but could not make ſuch a Conſtruction conſiſtently with Reſon, or any Rules of Law. The Conſtruction of this Surrender muſt be the ſame, as if the Eſtate had been limited by Feoffment, or any other Deed, and muſt be a-like governed by the ſame Rules of the Common Law.

It is neceſſary, upon the Creation of every Eſtate-tail, that it be expreſſed in certain of what Body the Heirs inheritable ſhould Iſſue. *Lit. Sect.* 31. 1 *Inſt.* 27. In a Gift of Lands to another to hold to him and to his Heirs Male, the Word [*Male*] was rejected, and the Word [*Heirs*] ſtood in the Limitation to make a Fee-ſimple; for that it could not be an Intail, there being no Limitation by the Gift, of what Body ſuch Iſſue ſhould be; and yet in that Caſe it was impoſſible to doubt, but that the Intention of the Donor was to make an Eſtate-tail; notwithſtanding which, it was held to be a Fee-ſimple, and Lord *Coke* very poſitive in his Opinion.

In the preſent Caſe, here is no Certainty of whoſe Body the Heir ſhall be; and the Words are ſufficient to carry a Fee-ſimple; indeed in a Will ſuch Words would make an Eſtate-tail, purely upon the Intent of the Deviſor; but there is a great Difference betwixt a Will, and a Conveyance at Common Law, as this is; for the Law has appointed proper Words to be made uſe of in Limitations of Eſtates in *Deeds*, as the Word [*Heir*] to carry a Fee-ſimple, and no other Word tantamount or equivalent will be admitted; whereas in a *Will* it is otherwiſe; for that is a new Conveyance by Force of the Statute of 32 *H.* 8. which ſays, It ſhall be lawful for a Man to diſpoſe of his Lands *by Will, at his Will and Pleaſure*; and this is the Reaſon, why a Deviſe to a Man *in perpetuum* paſſes a Fee-ſimple, at the ſame Time that theſe Words in a Deed give only an Eſtate for Life.

In this Limitation, we have no reſtrictive Words to turn the Eſtate, that by Force of the firſt Words is a Fee-ſimple, into an Eſtate-tail; indeed, if it had been ſaid, *if* Valentine *and* Alice *die without Iſſue of their Bodies*, that, being expreſs and particular, would have made it an Eſtate-tail; but as it now ſtands, the firſt Words carry a Fee-ſimple, and the latter, being conſiſtent with them, make no Alteration in the Eſtate. In the Caſe of 5 *H.* 5. 6. and — *H.* 6. the Limitations are certain and expreſs of whoſe Body.

But it is objected, that an Eſtate-tail may ariſe by Implication, as in *Perk. Sect.* 173.

If Lands are given to a Baſtard, and his Heirs, tho' ſuch Baſtard can have no other Heir but ſuch as is his Iſſue; yet it is a Fee-ſimple.

I agree that Caſe to be Law, for the Words are expreſs, but they are not ſo here; for in our Caſe the Words [*ſuch Iſſue*] import Heirs general, for there is no Heir but is the Iſſue of ſome Body; ſo that is only a Limitation of one Fee-ſimple upon another. If Lands are given to a Baſtard and his Heirs, he takes a Fee-ſimple; and a Limitation of a Remainder over upon ſuch Gift would be void; and yet the Lands cannot deſcend upon any other but his (*a*) Iſſue. But no Limitation of an Eſtate by (*b*) Implication ſhall control a precedent Limitation that is expreſs; as is agreed in the Caſe of *Seagood* verſus *Hone*, *Cro. Car.* 367. 1 *Jones* 342. And here the Eſtate in Fee-ſimple is an expreſs Eſtate; whereas the

(*a*) 1 Inſt. 3. b. (*b*) In *Bamfield* verſus *Popham*, 56, & poſt *Humberſton* verſus *Humberſton*, 333, & *Tomlinſon* verſus *Dighton*, 154.

the Eſtate-tail, which it is inſiſted ſhould control it, ariſes but by Implication.

The Caſe of *Abraham* and *Trigg* is ſo ſtrong as not to be anſwered, and does not in the leaſt differ from the preſent Caſe; for that was adjudged a Fee-ſimple, for Want of proper Words to deſcribe of what Body the Iſſue ſhould be. There is a difference betwixt a Limitation in the Genitive and one in the Ablative Caſe, as is held in *Beresford*'s Caſe; for the Word [*De*] is made uſe of in the Statute of *Weſtm.* 2. And if an Eſtate be limited to a Man and the Heirs Male of his Body, it muſt be tranſlated *De Corpore ſuo*; ſo if it be ſaid of any one, he was born of ſuch a Father, that, in *Latin*, would be *Genitus de tali patre.* 1 *Inſt.* 20. *b.* In *Abraham* and *Trigg*'s Caſe the Limitation was in the Genitive Caſe, (*ſcil.*) *and of his Heirs Male.*

As to the Caſe of *Boreton* verſ. *Nicholls*, *Cro. Car.* 363. reported alſo in *Littleton* 159. the Words [*ſuch Iſſue*] muſt there be taken to be Iſſue Male of the Body of *James* mentioned before, and the Reſolution of that Caſe doth not affect ours; there I admit it is a contingent Eſtate, but yet it might be a contingent Eſtate-tail. If we ſhould make this an Eſtate-tail, it would be repugnant to the Words in the firſt Part of the Limitation, which being to *Valentine* and *Alice* their Heirs and *Aſſigns*, ſhews the Intention of the Surrenderor to have been, that they ſhould have an aſſignable Eſtate; and then for us, by Conſtruction, to make this an Eſtate-tail, which is unaſſignable, would be contrary to the Inſtitution of the Statute *De Donis.* But it is

Objected, in Anſwer to this, that the Word [*Aſſigns*] is void, they being implied, and included in the Donee himſelf, and *Expreſſio eorum quæ, &c.*

Reſp. That Rule muſt be intended, where the Sentence is one intire Sentence; but ſtill thoſe Words, which, as to that Sentence, are Surpluſage and void, may notwithſtanding influence a ſubſequent Sentence; as in *Hob.* 170. *Dyer* 264. *b.* If I grant my Houſe and my Shop, the Word [*Shop*] is void, becauſe it paſſes as Part of my Houſe; but yet, in reſpect of ſubſequent Words, it may have a Signification: As if I grant my Houſe and Shop, excepting my Shop, here the expreſs Grant of my Shop, has ſuch a Signification, and is of ſuch Effect, as to make the Exception of the Shop void, it being before expreſly granted.

I

DE
Term. S. Michaelis,
1705.

Fellows verſus *Mitchell* and *Owen*.

Caſe 15.
Lord Keeper Cowper.
2 Vern. 504, 513.
Two Truſtees in a Mortgage join in an Aſſignment of the Term, and in a Receipt for the whole, each receiving a Moiety only of the Mortgage-Money; to be anſwerable only for what they reſpectively receive.

TWO Truſtees in a Mortgage for 2000 *l.* join in an Aſſignment of the Term, and in an Acquittance for the Money, and each receives a Moiety; after which one proves inſolvent; the Queſtion was, whether the other Truſtee ſhould be chargeable with the whole?

To prove that each Truſtee ſhould Anſwer for no more Money than he had himſelf received, were cited *Cro. Car.* 312. *Foſter* verſus *Townley*, and *Bridgman* 35. the ſame Caſe; alſo *Heaton* verſus *Marriot in Canc'*, on Exceptions, 31 *Oct.* 13 *Will.* 3. reheard *Jan.* 27. 1 *Annæ Reg'*; and lately in Chancery the Caſe of *Woodcock* and *Widdall*, who were Truſtees by Mr. *Lyſter*'s Will, where *Widdall* received all; and tho' *Woodcock* joined in the Sale to the Purchaſor, yet he was not charged.

Vernon cont': Each Truſtee ſhall be liable for the whole. The Caſe of *Foſter* verſus *Townley* was only, that one Truſtee ſhould not be charged where he had not joined in Receipts with the other. In *Woodcock*'s Caſe, the Truſtee, whom the Party would have charged, joined in the Conveyance, but not in the Receipt of the Conſideration-Money indorſed. In *Allen* and *Wilkin*'s Caſe, laſt *Lent* Vacation, both Truſtees were charged with each other's Receipts.

Freeman, on the ſame Side, cited the Caſe of *Murrell* verſus *Pitt*, at the Rolls laſt *Hillary* Term, where two Executors Truſtees joined in a Transfer of *Eaſt-India* Stock, and received in Moieties; and on one's proving inſolvent, the other was charged with the whole.

Alſo the Caſe of *Widmore* verſus *Bond*, twice heard before Lord *Sommers*; two Executors died leaving each an Executor; decreed, at firſt, that they ſhould be anſwerable only reſpectively for the Receipts of their ſeveral Teſtators; but upon a Rehearing, the Court charged each with the whole.

Cur': This is a Caſe of Difficulty; the laſt Lord Keeper took Time about it.

It is attended with Circumſtances ſomewhat uncommon; for the *Ceſtuique Truſt* has admitted, that he was preſent and conſenting to the Payment of the Money in Moities, and that at his Importunity the Truſtees joined in an Acquittance for the whole.

The Caſe of *Heaton* verſus *Marriot* is an expreſs Authority for the Truſtee, that he ſhall be only chargeable for his own Receipts.

It may be reaſonable, where upon the Proof it cannot be diſtinguiſhed, how much was received by the one Truſtee, and how much by the other, to charge each with the whole. For in ſuch Caſe the Truſtees are to blame for not keeping diſtinct Accounts. It is like one's throwing Corn or Money into another's Heap, where there is no Reaſon that he who made this Difficulty ſhould have the whole: On the contrary, becauſe it cannot be diſtinguiſhed, he ſhall have no Part.

See Preced. in Chan. 87.

In *Murrell* and *Pitt*'s Caſe it was a voluntary Act in them, being * Executors, to ſell the *Eaſt-India* Stock; but here, what the Truſtees did, was neceſſary for the Satisfaction of the Mortgagee.

Otherwiſe where Executors join in Sales, there being no Neceſſity for their ſo doing.

It ſeems to be *ſubſtantial* Injuſtice, to decree a Man to anſwer for Money which he did not receive, at the ſame Time that the Charge upon him by his joining in the Receipts, is but *notional*. Wherefore let (*a*) each Truſtee be diſcharged of the Truſt, by anſwering for ſo much only as he has actually received.

(*a*) See in the Caſe of *Churchill* verſus *Hopſon*, 243, & 1 Salk. 318. where the like Opinion is delivered by Lord *Harcourt*.

* See the ſame Diſtinction taken in the Caſe of *Aplyn* verſus *Brewer*, Preced. in Chanc. 173.

Elliot verſus *Davenport*.

Caſe 16.

Lord Keeper.

2 Vern. 521.

A. deviſes to *B.* 400 *l.* which he owed him, provided he ſhould thereout pay ſeveral Sums to his Children; the reſt he freely gives him, and directs his Executors to deliver up the Security, and not to claim any Part of the Debts, but to give ſuch Releaſe as *B.* his Executors, &c. ſhould require; *B.* dies in the Life of *A.* decreed this was a lapſed Legacy.

SIR *William Elliot* was indebted unto *Anne Davenport* in 400 *l.* by Recognizance, and afterwards *Anne Davenport*, by her Will, gave and bequeathed unto Sir *William Elliot*, his Executors, Adminiſtrators and Aſſigns, the Sum of 400 *l.* which he owed her, together with all Intereſt due for the ſame; provided, that he the ſaid Sir *William Elliot* ſhould pay, out of the ſaid 400 *l.* the ſeveral Legacies therein after mentioned, to his Children, (amounting to about 150 *l.*) and the Reſidue of the ſaid 400 *l.* ſhe gave to the ſaid Sir *William Elliot*, his Executors, Adminiſtrators and Aſſigns; and by her ſaid Will deſired and appointed her Executors not, by any Means, to claim or meddle with the ſaid 400 *l.* but that they ſhould freely deliver up the Security for the ſame, into the Hands of the ſaid Sir *William Elliot*, his Executors, Adminiſtrators and Aſſigns, and ſeal and execute unto the ſaid Sir *William Elliot*, *&c.* all ſuch reaſonable Releaſes and Diſcharges, and acknowledge Satisfaction for the ſaid 400 *l.* for the Safety of Sir *William Elliot*, *&c.* as the ſaid Sir *William Elliot*, *&c.* ſhould think fit.

Sir *William Elliot* died in the Life-time of the Teſtatrix; after which, the Teſtatrix died, and *William Elliot* the Heir of Sir *William* brought this Bill againſt the Executor of Mrs. *Davenport*, in order to be diſcharged of this Recognizance.

Upon which the Queſtion was, concerning ſo much of the 400 *l.* as was to remain to Sir *William*, after Payment of the Legacies to his Children, whether that was not a lapſed Legacy, by Reaſon of the Death of Sir *William* before the Teſtatrix?

1ſt, It was agreed by the Court, and likewiſe by the Counſel on both Sides, that where one gives a Legacy to a Man, his Executors, Adminiſtrators and Aſſigns, if, in ſuch Caſe, the Legatee dies in the Life of the Teſtator, tho' the Executors are named, yet the Legacy is loſt; for the Words [Executors, Adminiſtrators and Aſſigns,] are void, being but Surpluſage, *& expreſſio eorum*, *&c.* and they are by Suppoſition of Law named only to take in Succeſſion, and by Way of Repreſentation, as an Heir repreſents the Anceſtor, in caſe of an Inheritance; and to this Purpoſe *Brett* and

Rigden's Caſe was cited, *Plowd.* 340. Where Lands being deviſed to a Man and his Heirs, and the Deviſee dying in the Life of the Teſtator, it was held, that the Deviſe was void, and the (*a*) Heir could not take; conſequently if the Queſtion here, had depended upon this Clauſe only, the Legacy had been loſt.

(*a*) To this Purpoſe ſee more particularly in the Caſe of *Goodright* verſus *Wright*, 398.

2*dly*, It was held, that a Will might be ſo penned, as that, tho' the Legatee died in the Life of the Teſtator, yet his Executors ſhould have the Legacy; but then it ought to appear in the Will plainly, and by direct Words, that this was the Teſtator's Intention; and tho' a Will could not (as was allowed) enure as a (*b*) Releaſe, even ſuppoſing it to be ſealed and delivered, for Want of its taking Effect in the Teſtator's Life-time, yet, provided it were expreſſed to be the Intention of the Party, that this Debt ſhould be diſcharged, the Will would operate accordingly.

(*b*) 1 Vent. 39. & poſt *Sir Barnham Rider* verſus *Sir Charles Wager*, 2 Vol. 332.

And therefore *Lord Keeper* ſaid, that if this Queſtion had depended only upon the latter Clauſe, (*viz.*) that this Security ſhould be delivered up to Sir *William Elliot*, his Executors, Adminiſtrators or Aſſigns, in ſuch Caſe, it would be plainly an abſolute Diſcharge of the Debt, tho' the Teſtatrix had ſurvived the Legatee.

So that the Queſtion was reduced to this: Whether the latter Clauſe was to be taken as diſtinct from, or independent of the former Clauſe, in which Caſe the Legacy would ſubſiſt; or whether it ought to be looked upon as ancillary to, and dependant upon it, (*ſcil.*) if the Legacy took Effect, then and then only the Executor, in Conſequence of it, was to releaſe.

And his Lordſhip decreed, that this latter Clauſe was dependent upon the former, and therefore, that the Legacy being a lapſed Legacy, upon the former Clauſe, the latter did not prevent it. That what made ſuch Conſtruction appear the more reaſonable was, that the like Clauſe, in much the ſame Words, was added to the other Legacies given by the ſame Will, which could not operate by Way of Releaſe or Extinguiſhment; and tho' it might be the Intent of the Teſtatrix, that the Executors of the Legatee ſhould have the Benefit of the Legacy, (as probably this is always the Intent where a Legacy is given to a Man, his Executors, *&c.*) yet the Law being otherwiſe, ſuch Intent muſt not prevail: For which Reaſon, a Will that deſigns to prevent the lapſing of a Legacy, by the Death of the Legatee in the Life of the Teſtator, ought to be ſpecially penned.

A Will that deſigns to prevent the Lapſing of a Legacy, by the Death of the Legatee in the Life of the Teſtator, ought to be ſpecially penned.

Note; The Maſter of the Rolls, who heard this Cauſe the Day before, but adjourned it over for the Lord Keeper's Determination, (before whom it had been in Part firſt heard,) was of another Opinion. Lord Keeper alſo ſaid it was a doubtful Caſe*.

* An Appeal was brought from this Decree to the Houſe of Lords; but before Hearing the Parties agreed.

DE

Term. Paſchæ,

1706.

Legate verſus *Sewell*.

Caſe 17.

2 Vern. 551.

THIS Caſe was by the Lord Keeper ſent to the Judges of *C. B.* for their Opinion, and was as follows:

Deviſe to *A.* for Life, and after his Deceaſe to the Heirs Male of the Body of *A.* and the Heirs Male of the Body of every ſuch Heir Male, ſeverally and ſucceſſively, as they ſhall be in Priority of Birth, *&c.* Remainder over; Whether this be a Tenancy in Tail, or for Life only?

George Legate, ſeiſed of Lands in Fee, had a Wife named *Elizabeth*; he had no Iſſue of his Body, but had a Nephew named *William Legate*, being his deceaſed elder Brother's Son; he had likewiſe a Brother named *Henry*.

In *September* 1685, this *George Legate* by his Will after many Legacies therein given, deviſed his Lands, in default of Iſſue of his own Body, unto his ſaid Nephew *William Legate*, for and during the Term of his Life, and after his Deceaſe to the Heirs Male of the Body of his ſaid Nephew lawfully to be begotten, and the Heirs Males of the Body of every ſuch Heir Male ſeverally and ſucceſſively as they ſhould be in Priority of Birth, *&c.* and for want of ſuch Iſſue, to his Brother *Henry Legate* for his Life; and after his Deceaſe, to the Heirs Male of the Body of his Brother *Henry* lawfully begotten, *&c.*

Qu. Whether *William Legate* the Nephew had an Eſtate-Tail veſted in him, or an Eſtate for Life only in the Lands to him deviſed?

William Peere Williams pro Quer'.
William Melmoth pro Def. Sewell & Ux'.

May it pleaſe your Lordſhip,

The Certificate of three of the Judges of *C. B.* to the Lord Keeper on this Point.

In Purſuance of your Lordſhip's Order, the Parties concerned have attended us with their Counſel; and after hearing what was alledged by the Counſel on both Sides, and on Conſideration of the Will of *George Legate*, We are humbly of Opinion, that *William Legate* the Nephew, by Virtue of the ſaid Will of his Uncle, had an Eſtate-Tail veſted in him. This is ſubmitted to your Lordſhip's great Wiſdom.

T. Trevor,
Jo. Blencow,
Rob. Dormer.

The Certificate of Mr. Juſtice *Tracy*.

I am humbly of Opinion, that *William Legate* had only an Eſtate for Life by this Deviſe; and that the Words [Heirs Male of his Body] as this Caſe is, are Words of Purchaſe; for ſo the Intent of the Deviſor ſeems apparently to be, by limiting the Eſtate expreſſly to *William Legate* for his Life, and by the Limitation over to the Heirs Male of the Body of every ſuch Heir Male ſeverally and ſucceſſively, *&c.* which Words muſt be wholly rejected as idle and void, if we make the former Words [Heirs Male of the Body of the ſaid *William*

liam Legate] to be Words of Limitation. And this Conſtruction is (I think) warranted by the Caſe of (*a*) *Clerk* verſus *Day*, *Cro. Eliz.* 313. and by *Archer*'s Caſe in 1 *Co.* 66. *b.* for the Reaſon of *Archer*'s Caſe was, not that the Deviſe was to the Heir Male of the Tenant for Life, in the Singular Number, (for if it had gone no farther, it had been an Eſtate-Tail executed, the Word [Heir] being *Nomen Collectivum*, and the ſame with the Word [Heirs,] and ſo it was reſolved in the Caſe of *Pawſey* verſus *Lowdall*, 1 *Roll. Abr.* 626, and in the Caſe of *Clark* verſus *Day* cited before;) but the Reaſon why the Heir Male there took by Purchaſe was, becauſe the Eſtate was limited over to the Heirs Male of the Body of ſuch Heir Male; and ſo is the Opinion of the Court in the Caſe of *Pawſey* verſus *Lowdall*; and of the Lord C. J. *Hale*, in the Caſe of *King* verſus *Melling*, 1 *Vent.* 232.

(*a*) See this Caſe cited and ſtated at large Ante p. 57.

And if that be all the Reaſon of *Archer*'s Caſe, (and thoſe are great Opinions I have cited for it) then there is a direct Authority for me in this Caſe.

In the Caſe of *Liſle* verſus *Gray*, 2 *Jones* 114. 2 *Lev.* 223. Where the Limitations were to the ſame Effect as here, it was held not to be an Eſtate-Tail executed in the Father, who had an Eſtate for Life limited to him; and the Court went upon the ſame Reaſons (among others) which I have relied upon in this Caſe; and yet that was upon the Conſtruction of a *Conveyance*, where (generally) the Words ſhall be taken according to the legal Senſe, and their Operation in Law ſhall control the Intent and Meaning of the Party: But we are in the Caſe of a *Will*, where the Intent of the Party ſhall control the legal Senſe and Meaning of the Words.

And it appears by the Record of that Caſe of *Liſle* and *Gray*, that the Judgment of the Court of *B. R.* was affirmed in the Exchequer-Chamber, though the Reports of the Caſe differ in that Matter.

Rob. Tracey.

Memorandum. In this Caſe the Will of *George Legate* was of Money directed thereby to be laid out by his Executor in a Purchaſe of Lands, to be ſettled in Manner and according to the Limitations ſpecified in the Caſe above referred to the Judges; and therefore the Lord Keeper directed the Caſe to be made and laid before the Judges, ſuppoſing it to be Land; for that Money ordered to be laid out in the Purchaſe of Land, ſhould be as Land in Equity.

And it was inſiſted upon by Mr. *Vernon*, that where Money is ordered by a Will to be laid out in Land, and to be ſettled on *A.* in Tail, Remainder over to *B.* there the Court has decreed the Money to be paid to *A.* becauſe it would be in vain to decree an Eſtate-Tail in the Land, which he might cut off by a Common Recovery. Indeed, if *A.* were an Infant, the Court probably would not decree (*a*) the Money to be paid to him; becauſe during his Infancy no Recovery could be ſuffered, and *A.* might die before he came of Age. And to this Purpoſe was cited the Caſe of Sir *Robert Carr*, decreed by Lord *Jeffreys*.

(*b*) Poſt in *Short* verſus *Wood*, p. 471.

Sir *Thomas Powis cont'*: Why ſhould not the Remainder-Man have the Benefit of the Chance of the Tenant in Tail's dying before a Common Recovery ſuffered? And for what Purpoſe are Recoveries kept up, but as ſo many *Mediums* betwixt a raſh and a deliberate Act? Beſides, the Tenant in Tail, though of Age, may yet die in a Vacation before a Term, and ſo not have it in his Power to ſuffer a Recovery.

Lord Keeper: If this were *Res integra*, where a Purchaſe is directed to be made, and the Land to be ſettled on *A.* in Tail, *&c.* it would be moſt reaſonable for Equity to decree the Truſt to be executed, and the Eſtate-Tail to be ſettled, with the Remainder over; that ſo ſuch Remainder-Man might have the Benefit of the Chance of Tenant in Tail's dying before his having ſuffered a Common Recovery.

The leaſt Right, and though of the leaſt Value, yet if it be a Right, ought not to be taken from any Man; but this Matter ſeems not now open; and I would not break in upon former (*a*) Reſolutions.

(*a*) But the Practice ſeems to have been ſince otherwiſe.

I agree, the Caſe of (*b*) *Champernowne* verſus *North*, *viz.* that a Common Recovery by *Ceſtuy que Truſt* in Tail ſhall bar the Remainder as much as a Recovery by Tenant in Tail of a legal Eſtate; but whether only a Deed executed by *Ceſtuy que Truſt* in Tail ſhall bar the Remainder-Man, or even the Iſſue, that is with me a Doubt; in regard a Deed may be made at a Tavern, or by Surprize; but a Recovery is a ſolemn and a deliberate Act.

(*b*) 2 Chanc. Rep. 78. 1 Vern. 13, 440.

Bare Articles, or a Deed only executed by Tenant in Tail, in Equity, ſeem hardly ſufficient to bar the Intail.

It ſeems, in this Caſe there had been a Decree long ſince obtained by *William Legate* the firſt Deviſee, againſt the Executor of the Teſtator, by which it was directed, that the Executor, inſtead of laying out the Money in a Purchaſe, ſhould pay it to *William Legate* the firſt Deviſee. But *Henry Legate*, the Deviſee in Remainder, not being Party to this Decree, it was held to be void as to him, and in no ſort binding.

The Court appearing afterwards not to be ſatisfied with the Certificate of the three Judges, directed that an Ejectment ſhould be brought in *B. R.* in order to have the Matter ſettled: But it is ſaid the Parties agreed, and ſo the Queſtion was not determined.

Caſe 18.

Sir *George Newland* and *Beckley*, Executors of *Watts* verſus ——.

See in the Caſe of *Orlebar* verſus *Fletcher* and the *Duke of Kent*, p. 738.

A Creditor by Statute of *J. S.* if *J. S.* become Bankrupt, and the Statute not ſued and executed before the Bankruptcy, ſhall come in only *pro ratâ*, though there were Lands in Fee bound by the Statute.

ONE ſeiſed of Lands in Fee owes a Debt by Statute, and afterwards becomes a Bankrupt, and the Creditor by Statute extends the Lands, then a Commiſſion of Bankruptcy is ſued out; and whether the Lands ſhould be liable to the Statute-Creditor? was the Queſtion.

Upon Importunity of Counſel, Lord Chancellor referred this to the Judges of *C. B.* before whom it was inſiſted by Serjeant *Pratt* and myſelf, that the Lands were actually bound by the Statute; and the Creditor relying on this Security, it would be hard that the doubtful Words of the Stat. 21 *Jac.* 1. *cap.* 19. *ſect.* 9. ſhould diſcharge it. And with Regard to that Clauſe of the Act which ſays, "That Creditors by Judgment, Statute, &c. whereof no Execution or Extent is ſerved or executed on the Lands or Goods of the Bankrupt before his becoming bankrupt, ſhall not be relieved for more than a ratable Part of their juſt Debt, without Reſpect had to the Penalty of the Statute or Judgment." We urged, this extended only to relieve againſt the *Penalty*; and the Words, [Creditors ſeeking Relief ſhall not be relieved,] &c. muſt be intended to mean, [ſhould not be relieved upon the Commiſſion of Bankruptcy in a Court of Equity] but if at Law they could prevail, (as here by an Extent upon the Land) the Statute did not hinder them.

But all the Judges of *C. B. contra*; who held, that the Clauſe of the Statute was full and plain, that all the Creditors of the Bankrupt, unleſs where there was a Mortgage, ſhould be equally paid. And,

Trevor C. J. ſaid, A Judgment or Recognizance did no more bind the Lands, than the *Teſte* of a *Fi. fa.* bound the Goods at the Time of the making of this Statute; and it was plain, if the *Fi. fa.* was not ſerved and executed, ſuch Creditor, notwithſtanding his ſuing out his *Fi. fa.* ſhould come in only in Proportion with the Creditors even by ſimple Contract.

DE

Term. S. Hillarii,

1706.

Caſe 19.

Beck verſus *Rebow*.

Hangings, Chimney-Glaſſes, or Pier-Glaſſes, are Matters of Ornament and Furniture, and not to go with the Houſe.

THE Plaintiff *Beck* married the Daughter of Alderman *Chamberlain*, and in Conſideration of this Marriage, and of a Settlement made by the Plaintiff *Beck* on his Wife, and the Iſſue of the Marriage, Alderman *Chamberlain* covenants to ſettle his Houſe in *Leaden-hall-Street* on the Plaintiff *Beck* and his Wife, and the Iſſue of the Marriage; and likewiſe covenants to grant to the Plaintiff all the Pictures upon the Stair-Caſe, over the Doors and Chimney-Pieces, and *all Things fixed to the Freehold* of the Meſſuage.

Alderman *Chamberlain* died, having made the Defendant his Executor, to whom he deviſed this Houſe in Truſt, to ſettle it according to the Marriage Articles; but the Defendant the Deviſee in Truſt of the Houſe, had, after the Death of the Teſtator, taken away the Pictures upon the Stair-Caſe, and over the Doors and Chimneys, and likewiſe the Pier-Glaſſes, Hangings, and Chimney-Glaſſes, which the Plaintiff alledged were as Wainſcot, and fixed to the Freehold of the Houſe;

and the Bill (*inter al'*) was, that the Defendant ſhould make a ſpecifick Performance of the Articles, and account for the Value of the Pier-Glaſſes, Pictures Chimney-Glaſſes and Hangings, which the Defendant had taken away.

It was urged for the Plaintiff, that theſe Hangings, Pier-Glaſſes, Chimney-Glaſſes and Pictures were as Wainſcot, being fixed with Nails and Screws to the Freehold; and that there was no Wainſcot under them; and as they would have gone to the Heir, and not to the Executor:

So *à fortiori*, would they in this Caſe go to the Plaintiff, who was as a Purchaſer of the Houſe in Conſideration of Marriage, and a Settlement; and eſpecially, the Covenant being to grant to the Plaintiff all Things fixed to the Freehold: And the Caſe of *Cave* verſus *Cave* (*a*) was cited as in Point.

But Lord Keeper, as to all but the Pictures over the Doors, Chimney-Pieces, and on the Stair-Caſe, was of a different Opinion; ſaying, that Hangings and Looking-Glaſſes were only Matter of Ornament and Furniture, and not to be taken as Part of the Houſe or Freehold, but removable by the Leſſee of the Houſe.

D E

(*a*) 2 Vern. 508.

DE

Term. S. Trinitatis,

1707.

Caſe 20. *Lord Chancellor* Cowper. Deviſe of a Debt to two, Share and Share alike, equally to be divided between them, and if any of them die, then to the Survivor; they are Tenants in Common, and not Jointenants. *Qu.*

Lord Bindon verſus *Earl of Suffolk.*

THE late Earl of *Suffolk* did by his Will give and bequeath the Sum of 20,000 *l.* (due to him from the Crown) to his five Grandchildren, Share and Share alike, equally to be divided between them, and if any of them died, then his Share to go to the Survivors and Survivor of them.

Upon this the only Queſtion was, whether the five Grandchildren were Tenants in Common, or Jointenants?

And on Debate, Lord Chancellor held and decreed, that the Grandchildren were Tenants in Common, and not Jointenants; ſo that if one died, his Share ſhould go to his Executors, and not to the Survivors. The Reaſons on which he grounded his Opinion were, that by the firſt Words [Share and Share alike] it was very plain the Legatees were Tenants in Common; and by the ſubſequent Words [that if any of them died, his

Share ſhould go to the Survivor] it muſt be intended, if any of them ſhould die *in the Life-time of the Teſtator*; for by that Conſtruction, every Word of the Will would have its Effect and Operation: For were it not for this Clauſe, if any of the Grandchildren had died in the Life of the Teſtator, that Grandchild's fifth Part would have been a (*a*) lapſed Legacy, and have gone to the Executor, as undiſpoſed of by the Will; but by this Deviſe over, if it ſhould ſo happen that any of the Grandchildren ſhould die in the Life-time of the Teſtator, ſuch Share would go to the Survivors.

(*a*) See poſt *Bagwell* verſus *Dry*, 700.

And though it was objected, that the Will of the Teſtator could not ſpeak, nor take any Effect, until the Teſtator was dead; yet the Lord Chancellor obſerved, that the Will was *inchoate*, though *not conſummate*, from the Execution of it; and that to many Purpoſes in Law, it did relate to the (*b*) Time of the making; and the Words [if any of my Grandchildren die] muſt not be taken indefinitely, for it is moſt certain that they and all others muſt die: And to underſtand it in the Senſe that had been contended for by ſome, (*viz.*) If any of my Grandchildren ſhould die before the Receipt of the Money, that was intirely *de hors*, there being nothing in the Will tending to juſtify ſuch Conſtruction.

(*b*) Salk. 237. & Vol. 2. p. 30. *Gore* verſus *Gore*. *Wind* verſus *Albone*, p. 575.

So that it muſt be underſtood, if any of the Grandchildren ſhould die in the Life of the ſaid Teſtator, from which Conſtruction every Word of the Will would take Effect.

This Decree was reverſed on Appeal to the Lords. Though *Quære*, whether in the Caſe of *Stringer* and *Philips*, which was (*c*) decreed at the *Rolls* in *Mich.* 1730, Lord *Cowper*'s Opinion, be not adhered to?

(*c*) Abr. of Caſes in Equity 292, 3.

DE
Term. S. Michaelis,
1707.

Caſe 21.

Higgins verſus *Dowler*. On Demurrer.

Salk. 156.
2 Vern. 600.

Limitation of a Truſt of a Term to a Man for Life, Remainder to his firſt, &c. Son in Tail, and for want of Iſſue Male, then to all his Daughters, there never having been a Son; adjudged the Truſt to the Daughter good.

ALice Higgins demiſed the Premiſſes (being a Term for 999 Years) to Truſtees, in Truſt for her ſelf during her own Life, and after her Death, for *Henry Higgins* her Son; after his Death, for *Mary Dowler* his intended Wife, and after their ſeveral Deceaſes, for the eldeſt Son of the ſaid *Henry Higgins* begotten on the Body of the ſaid *Mary Dowler*, in Tail; and for Default of Iſſue of ſuch firſt begotten Son, for all and every the other Son and Sons of the ſaid *Henry Higgins*, begotten on the Body of the ſaid *Mary Dowler*; and for Default of Iſſue Male of the ſaid *Henry Higgins* begotten on the Body of the ſaid *Mary Dowler*, then in Truſt for all and every the Daughters.

There never was a Son of the ſaid Marriage, but there was a Daughter; and the Husband and Wife being both dead, it was objected by Sir *Thomas Powis*, that the Limitation of the Truſt to the Daughter was void, it being after Limitations in Tail to the Sons, which in Caſe of a Term was not to be allowed.

Sed per Lord Chancellor with great Clearneſs: There is a Diverſity where the Limitation in Tail ever veſted; for there it muſt be admitted the Remainder over would be void; but as in this Caſe there never was a Son, the Remainder of the Truſt of the Term to the Daughter is good; and it is no more than a Limitation of a Truſt of a Term two Ways, (*ſcil.*) if there be a Son by the Marriage, then the Limitation is to that Son, but if there be no Son by the Marriage, but a Daughter, then to that Daughter; and this is not too remote a Contingency, becauſe confined to a Life in Being.

However, as I am not for determining this Point without further Conſideration, over-rule the Demurrer.

But afterwards on the (*a*) Hearing, his Lordſhip diſmiſſed the Bill.

(*a*) 30 May 1708.

On the Authority of this Caſe that of *Stanley* verſus *Leigh* was adjudged by his Honour the Maſter of the Rolls, which ſee *poſt.*

Vol. 2. p. 618.

Gawler verſus *Wade.*

Caſe 22.

ONE binds himſelf and his Heirs in a Bond, and deviſes his Lands to *J. S.* the Bill was brought upon the Statute of the third and fourth of *William & Mary, cap.* 14. to affect the real Aſſets in the Hands of the Deviſee.

One ſeiſed of Lands in Fee binds himſelf and his Heirs in a Bond, and deviſes his Lands to *J. S.* in Fee, and dies; in a Bill brought by the Obligee in the Bond, to ſubject the Deviſee to the Payment of Debts, the Deviſor's Heir muſt be made a Party.

And objected, that the *Heir* of the Deviſor ought to be made a Party to the Suit, the Statute ſaying, that an Action of Debt ſhall be brought againſt the Heirs at Law, and ſuch Deviſees *jointly*.

It was anſwered by the other Side, that the Will having given all from the Heir, and thereby broken the Deſcent, it would be a vain Thing to make the Heir a Party, in regard it would only oblige the Plaintiff to pay him Coſts; that it was true, had ſome Part of the real Aſſets deſcended to the Heir, then the Heir was to be made a Party, for then there was to be an Average; but when nothing deſcended to the Heir, there could be no Reaſon, in ſuch Caſe, for bringing him before the Court.

And tho' in an Action at Law, it was neceſſary to make the Heir a Defendant, that was, becauſe the Debt was in the *Debet et detinet*, and the Heir privy to the Anceſtor, and the Deviſee not; and ſo, for Conformity Sake, the Statute, in an Action at Law, directed that the Heir ſhould be a Co-Defendant; yet it was otherwiſe in a Suit in Equity.

Lord Chancellor *Cowper*. It is the Act of Parliament makes this Aſſets in the Deviſees Hands; and *that* requiring the Heir to be made a Defendant, you muſt follow the Remedy therein preſcribed; and this Bill in Equity, is as an Action at Law; otherwiſe if there were no Heir; and perhaps it might be otherwiſe too, if the Bill had charged that the Plaintiff had made Inquiry, and could find or diſcover no Heir.

Young verſus *Cottle* & *è cont.*

Caſe 23.

Appointment by Deed of ſuch and ſuch Annuities to be paid out of an Office, countermandable.

THE Archbiſhop of *Canterbury* in 1673. granted the Regiſter's Office of the Prerogative-Court to *Mark Cottle*, *Exton*, and *Sheldon*, for their Lives; *Sheldon* dies, *Exton* declares by Deed, that his Name was uſed in Truſt for *Mark Cottle*, and covenants to depute *Mark Cottle*, his Executors or Adminiſtrators, or ſuch as he ſhould appoint, and in the mean Time to receive the Profits to ſuch Uſes, and under ſuch Truſts, as *Mark Cottle* ſhould direct.

Mark Cottle by Deed (executed ſo long ſince as in 1679. and all of his own Hand-writing,) appoints, that after his Death, one *Richard Hoar*, who was then in his Office, ſhould be the Deputy Regiſter; and in caſe of his Death, or Removal, ſuch other Perſon as his Executors ſhould appoint; and directs ſeveral Annuities to be paid out of the Office, and that one Moiety of the Surplus ſhould be paid to his Wife for her Life, and after her Death, to the Defendant's Father *Mark Cottle* the younger, (being Nephew of old *Mark Cottle*) and the Defendant; and the other Moiety to belong to the ſaid *Mark Cottle* the Nephew, and the Defendant his Son.

Under this Deed (old *Mark Cottle*'s Wife being dead, and *Mark Cottle* the Nephew being alſo dead,) the Defendant ſurviving his Father, became well intitled to the whole Profits of the Office.

But old *Mark Cottle* did, by another ſubſequent Deed in 1681. make different Appointments of the Profits of the Office, under which the Defendant was intitled to the Profits of a Moiety of the Office only, and *Hoar* (who was to be Deputy of the Office after old *Mark's* Death,) died; upon which old *Mark*, by the latter Deed, appointed another Deputy, and ſoon after old *Mark Cottle* died, leaving his Widow Executrix, who, claiming a greater Intereſt in the Office under the latter, than under the former Deed, concealed the former; and a good Account was given in Proof, why the Defendant did not claim under the firſt Deed for ſo many Years, but accepted his Share under the ſecond Deed.

And now the only Queſtion was, which of theſe two Deeds ſhould prevail?

It was objected, that the firſt Deed, being an abſolute Diſpoſition of the Profits of the Office, without any Power of Revocation, ought to ſtand; and tho' this firſt Deed was all along in the Cuſtody or Power of old *Mark Cottle*, yet ſo (generally) were all voluntary Settlements, notwithſtanding which, in caſe of (*a*) two different voluntary Settlements of the ſame Eſtate, the firſt ſhould prevail; and the Caſe of the Ducheſs of *Albemarle* (*b*) and the Earl of *Bath* was cited, where there was a voluntary Settlement, and a Power of Revocation in the Preſence of ſix Witneſſes, whereof three were to be Peers, and there was a Writing importing a Revocation, but not being atteſted according to the Power, it was not ſufficient.

On the other Side it was anſwered, that this Appointment of 1679. in the firſt Deed was in the Nature of a *Will*, and conſequently revocable by any later Deed.

Lord Chancellor: The firſt Deed is only an Authority, and therefore clearly countermandable by the ſecond;

(*a*) Vide 2 Vern. 473. *Clavering* verſus *Clavering*, accord', ſed poſt 580. *Naldred* ver. *Gilham*, 577. contra.

(*b*) Caſes in Chan. Part 3. p. 55.

and it is no more, than if one ſhould appoint his Bailiff of his Manor of *Dale*, to pay one Moiety of the Profits to *A.* and the other Moiety to *B.* this is countermandable at Pleaſure; and by the ſame Reaſon that old *Mark Cottle* could appoint another Deputy, after his Death, to manage the Office, (*Hoar* the firſt appointed Deputy being dead,) ſo could he alſo make another Diſpoſition of the Office.

Whereupon the Court decreed againſt the firſt Deed in Favour of the ſecond, and that the firſt ſhould be delivered up.

D E

DE

Term. S. Hillarii,

1708.

Caſe 24.

Collins verſus *Plummer*.

2 Vern. 635. Upon a Settlement *A.* is made Tenant for Life, Remainder to the Heirs of his Body by his Wife *Jane*, and in the ſame Deed *A.* covenants not to ſuffer a Recovery, but that the Lands ſhall be enjoyed according to theſe Limitations; *A.* does ſuffer a Recovery and deviſes the Lands; the Covenant good to bind the Aſſets; but *A.* being Tenant in Tail, and as ſuch, having Power to ſuffer a Recovery, the Lands deviſed ſhall not be affected.

ONE in Conſideration of Marriage ſettles Lands upon himſelf for Life, Remainder to his intended Wife for Life; Remainder to the Heirs of his Body on his Wife to be begotten; Remainder to his own right Heirs.

And in the Deed of Settlement there is a Covenant with the Truſtees from the intended Huſband, for himſelf and his Heirs, that he will not diſcontinue, dock, or ſuffer any Recovery, to bar the Limitations in the Settlement, but that the Iſſue of the Marriage ſhall enjoy and hold the Premiſſes purſuant to the ſaid Limitations.

The Marriage takes Effect; and they have Iſſue a Daughter, who marries the Plaintiff, and to whom her Father, who made the Settlement and Covenant, gave a conſiderable Portion.

The Father afterwards ſuffers a Recovery to the Uſe of himſelf and his Heirs, and then deviſes the Lands in Truſt for his ſaid Daughter for Life, with Remainder to her firſt, *&c.* Son in Tail Male; and if the Daughter ſurvived the Huſband, to the Daughter in Fee; but if the Daughter ſhould die firſt, then the Remainder over, and dies.

The Huſband and Wife bring a Bill againſt the Deviſee and Executor of the Father for a ſpecifick Performance of the Covenant; and for the Plaintiff it was inſiſted, that this Covenant was not only a good Covenant, but bound the Land.

And tho' a Condition that Tenant in Tail ſhould not ſuffer a (*a*) Recovery, was void, juſt as a Condition that Tenant in Tail ſhould not alien was; yet, in each of thoſe Caſes, a Covenant not to alien, or a Covenant that Tenant in Tail ſhould not ſuffer a Recovery, was good.

(*a*) 1 Inſt. 224.

Then if this Covenant was a good Covenant, it ſhould in Equity operate as a Diſability upon the Father from ſuffering a Recovery; eſpecially, in regard it was in the Marriage-Settlement, and conſequently to be taken as Part of it; and it was compared to the Lord *Peterborough*'s Caſe, where there was Tenant for Life, with a Power to make Leaſes, and the Tenant for Life covenanted he would not make Leaſes; but afterwards, notwithſtanding his Covenant, executed ſuch Power; upon which Equity ſet aſide the Leaſes; and for the ſame Reaſon Equity ſhould ſet aſide this Recovery, or at leaſt decree, that thoſe claiming under it, ſhould convey ſuch Eſtate to the Daughter and Heir of the Marriage, and in ſuch Manner as ſhe ſhould have taken, if ſuch Recovery had not been ſuffered.

On the contrary it was urged, that a Condition that Tenant in Tail ſhould not alien by Recovery, was void; and a Covenant, if it would affect the Land, was the ſame Tie upon the Land as a Condition, and conſequently muſt be void too.

That it was an uſeful Maxim in Law, that Lands ſhould not be unalienable.

But beſides, the Deviſe, as here penned, anſwered the Intent of the Settlement; and it was the Huſband of the Daughter that would now have the Intail in the Daughter, in order, that by a Recovery, he might get the Eſtate veſted in himſelf, and deprive the Family of it; whereas by the Limitations in the Will the Eſtate was ſecured to the Heirs Male of the Marriage; and the Wife, if ſhe ſurvived, was to have the Fee.

Lord Chancellor: The Covenant being in the ſame Deed with the Settlement, proves that the Conveyancer knew very well that the Father might ſuffer a Recovery, and that it was an Intail in him.

And tho', if this were only Articles by which Lands were covenanted to be conveyed to *A.* for Life, with Remainder to the Heirs Male of his Body; on a Bill brought for the Execution of ſuch Articles, the Lands would be ſettled upon *A.* for Life, (*a*) with Remainder to his firſt, *&c.* Son in Tail Male; yet here it is the Caſe of an actual Settlement, and not of Articles.

Articles to ſettle Lands to one for Life, Remainder to the Heirs of his Body; in Execution of the Articles, Equity ſhall go according to the Intent, and not direct an Eſtate-tail according to the Words. (*a*) See the Caſe of *Trevor* verſus *Trevor*, p. 622.

The Conveyancer knowing therefore, that it was an Intail in the Father who took by the ſame Deed, it is plain the Intention of the Deed was, that the Parties ſhould rely and depend on the Security of the

Father's Covenant; and Equity ought not to vary or alter the Security which the other Side has agreed to accept of, for that would be going beyond, and conſequently againſt the Intent of the Parties.

It may be compared to the Caſe of Lord (*a*) *Warrington* and Sir *Stephen Langham*, where one covenanted to leave his Daughter 10000 *l.* and it was ſought by the Bill to make the Party give Security for Performance of this Agreement; but denied *per Cur'*; becauſe the Plaintiff agreed to accept of the Covenant, and Equity would not alter the Agreement of the Parties: And this differs from the Caſe of Lord *Peterborough*; becauſe here the Covenant is in the *ſame* Deed, but there was an Agreement *ſubſequent* to the raiſing of the Power, to extinguiſh it. Further, in this Caſe the Intent of the Settlement is more effectually anſwer'd, than it would have been if the Land had deſcended in Tail to the Daughter; for then it would have been alienable from the Iſſue Male; whereas here it cannot; and therefore I am of Opinion, the Covenant does not bind the Land, ſo as to defeat the Will or Recovery.

One covenants to leave his Daughter 10000 *l.* Equity will not compel him to give any further Security than this Covenant, that being at firſt accepted.

(*a*) Precedents in Chan. 89. alſo ſee poſt *Boſvil* verſus *Brander*, p. 461.

But it being preſſed, that they might be at Liberty to ſue the Executor, and recover out of the Perſonal Aſſets, and in order thereto, that an Iſſue might be directed:

Per Cur': Then let the Iſſue be, not what the *Husband* but what the *Wife*, or her *Iſſue*, is damnified by the Breach of this Covenant.

Tho' ſurely the Plaintiffs come too ſoon in this Caſe, for the Wife may ſurvive; and the whole being limited to the Wife, if ſhe does ſurvive, ſhe perhaps may be no Ways damnified.

Alſo it being alledged, that the Teſtator did moreover give a Portion to the Daughter, the Defendant ſhall have Liberty to give in Evidence any Thing of that Kind, which may tend to a Satisfaction of this Breach of Covenant.

The Court likewiſe obſerved, that the Covenant in this Caſe was, not only that the Father ſhould not ſuffer a Recovery, but that the Premiſſes ſhould be held and enjoyed purſuant to the Uſes limited, which latter Covenant, being executory, was the ſtronger, as it might afford ſome Pretence for a ſpecifick Performance thereof: But upon the whole,

His Lordſhip thought the latter Covenant was to be conſtrued as relative to, and dependant upon, the former, and to be reſtrained by *that*; and to have meant no more, than that the Father ſhould not, by ſuffering a Recovery, prevent the Premiſſes from being enjoyed according to the ſaid Limitations.

Caſe 25.
Lord Chancellor Cowper.
Vide 2 Vern. 680. where this Caſe is cited.

Watts & al' verſus *Ball & al'*.

THE Caſe in Effect was: One ſeiſed of Lands in Fee had two Daughters, and deviſed his Lands to Truſtees in Fee, in Truſt to pay his Debts, and to convey the Surplus to his Daughters equally.

There ſhall be a Tenancy by the Curteſy of a Truſt, as well as of a legal Eſtate.

The younger Daughter married and died, leaving an Infant Son and her Huſband ſurviving.

The eldeſt Daughter brought a Bill for a Partition; and the only Queſtion was, whether the Huſband of the younger Daughter ſhould have an Eſtate for Life conveyed to him, as Tenant by the Curteſy?

The Huſband in his Anſwer had ſworn, that he married the younger Daughter, upon a Preſumption that ſhe was ſeiſed in Fee of a legal Eſtate in the Moiety; that at the Time of the Marriage ſhe was in the actual Receipt of the Profits of ſuch Moiety; and it was admitted, that this Truſt was not diſcover'd until after the Death of the younger Daughter, nor until it was agreed, that a Partition ſhould be made.

Decreed by Lord Chancellor, that (*a*) Truſt Eſtates were to be governed by the ſame Rules, and were within the ſame Reaſon, as legal Eſtates; and as the Huſband ſhould have been Tenant by the Curteſy, had it been a legal Eſtate, ſo ſhould he be of this Truſt-Eſtate; and if there were not the ſame Rules of Property in all Courts, all Things would be, as it were, *at Sea*, and under the greateſt Incertainty.

(*a*) Vide *Philips* verſus *Philips*, p. 35.

His Lordſhip added, that this being a Caſe of ſome Difficulty, he could have wiſhed it had not come before him as a Cauſe by Conſent; but his Opinion was, that the Huſband ought to be Tenant by the Curteſy; and the rather, becauſe it appeared that he, upon his Marriage, did conceive and preſume his Wife to be ſeiſed of a legal Eſtate in the Moiety, and had Reaſon to think ſo, ſhe being in Poſſeſſion thereof.

Wherefore it was decreed, that an Eſtate for Life in a Moiety in Severalty, ſhould be conveyed by the Truſtees to the Huſband, with Remainder in Fee to his Son.

(a) 2 Vern. 536. So where Money is to be laid out in the Purchaſe of Lands in Fee, to be conveyed to the Wife, tho' the Wife dies before the Purchaſe made.

In this Cauſe Mr. *How*, (who was for the Huſband) cited the Caſe of *Sweetapple* verſus (a) *Bindon*, where Money was deviſed to be laid out, for the Benefit of a Feme Sole, in the Purchaſe of Lands in Fee; the Feme married, and had Iſſue, and died, the Huſband ſurviving; and decreed in Equity, that tho' the Money was not inveſted in a Purchaſe during the Life of the Wife, yet in regard, in this Caſe, if it had been ſo laid out, the Huſband would have been Tenant by the Curteſy; and that this was as Land in Equity, therefore the Huſband was equally intitled.

(b) Caſes in Parl. 69. Whether Tenant in Dower ſhall have the Benefit of a Truſt-Term. Vide in *Lady Williams* verſus *Wray*, p. 138.

And Mr. *Vernon* told me, that tho' in the Caſe of (b) Lady *Radnor* and *Vandebendy* it was decreed in Equity, and affirmed in the Houſe of Lords, that a Feme Dowreſs ſhould not have the Benefit of a Truſt-Term, where the Huſband died ſeiſed of the legal Eſtate of the Freehold, yet that the contrary, on Conſideration, was decreed by Sir *John Trevor* Maſter of the Rolls, in the Caſe of *Dudley* (c) verſus *Dudley*.

(c) Precedents in Chan. 241. But in what Caſes, and under what Circumſtances a Dowreſs ſhall have Relief in this Court, ſee diſcuſſed at large by the late Maſter of the Rolls (Sir *Joſeph Jekyll*) in his Reſolution in the Caſe of *Banks* and *Sutton*, 2 Vol. 632.

DE
Term. S. Michaelis,
1709.

Lamplugh verſus *Lamplugh*.

Caſe 26.

Father buys an Eſtate in the Name of his younger Son and of a Truſtee; it ſhall be taken as an Advancement: So tho' a Reverſion be ſettled on the younger Son, expectant on the Mother's Death.

ONE had two Sons by ſeveral Venters, upon the younger of which, an Eſtate was ſettled expectant upon his Mother's Death; and the Father purchaſed an Eſtate, Part Freehold of Inheritance, and the other Part a Leaſe for a Term of Years (of which Land he himſelf had the Inheritance,) and bought theſe Lands, the Freehold, in the Names of the younger Son and the Father's Nephew, and the Leaſehold, in the Names of the younger Son and the Father's Mother.

But in the Conveyance, the whole Purchaſe-Money was mentioned to be paid by the Father.

After this, the Father took the Profits during his Life, and died, leaving the younger Son about the Age of eight Years.

The eldeſt Son brought his Bill againſt the younger Son and the reſpective Truſtees, inſiſting, that the Money being mentioned in the Deed to have been paid by the Father, this made the Defendants Truſtees for the Father, and conſequently for the Plaintiff.

But the Truſtees diſclaiming any Intereſt in the Eſtate, it was decreed by the Lord Chancellor, 1*ſt*, That the younger Son was a Son unprovided for, notwithſtanding this Reverſion which he was intitled unto after his Mother's Death; for the Mother might ſurvive the Father many Years, and in that Time the younger Son might ſtarve, if he were to have no other Proviſion.

2*dly*, That if the Purchaſe had been made in the younger *Son's Name only*, this had been plainly an Advancement of the younger Son, and no Truſt; and the preſent Caſe did not differ, in regard the Perſons named with him did diſclaim; and eſpecially, ſince prudential Reaſons might be given, why theſe Perſons were joined, (*viz.*) that they might help and protect the Infant younger Son; alſo to prevent the Eſtate's deſcending to a remote Relation, in caſe the younger Son by the ſecond Venter ſhould have died before his Father; for in ſuch Caſe, a Court of Equity might have ſaid, if the Father were to come for the Eſtate, that tho' this would have been an Advancement, in caſe the younger Son had lived to have enjoyed it, yet the younger Son dying, the Truſtees ſhould, in Equity, have conveyed it back to the Father; and this might be the Uſe and Intention of naming theſe Truſtees: Beſides, the younger Son being but eight Years old, was unfit to be a Truſtee, and therefore muſt be intended to have been named for his own Benefit.

3*dly*, It was alſo ruled, that the Statute of Frauds and Perjuries, which ſays, " (*a*) That all Conveyances, " where Truſts and Confidences ſhall ariſe or reſult " by Implication of Law, ſhall be as if that Act had " never

(*a*) Sect. 20.

" never been", muſt relate to *Truſts* and *equitable Intereſts*, and cannot relate to an *Uſe* which is a *legal Eſtate*.

Laſtly, That parol Evidence ſhould be admitted to ſhew the Intention of the Father, that this Conveyance was for the Benefit and Advancement of the younger Son; becauſe it concurred with the Conveyance, and was only to rebut (*a*) a pretended reſulting Truſt: And as to the Father's taking the Profits during his Life, that could be no Evidence of a Truſt for him, for it muſt be intended to have been done by him as Guardian (*b*) to the Son.

(*a*) Vide the next Caſe.

(*b*) Vide in *Lloyd* verſus *Read*, p. 608.

And the eldeſt Son's Bill was diſmiſſed with Coſts.

DE

Term. S. Hillarii,

1709.

Caſe 27. ## *Lady Dowager Granvile* verſus *Ducheſs Dowager of Beaufort.*

2 Vern. 648.

An Executor has a particular Legacy, and yet held intitled to the Surplus.

THE late Duke of *Beaufort* by his Will gave ſeveral ſpecifick Legacies to all his Children and Grandchildren, and deviſed the Uſe of his Silver Plate, for the Service of his Table, to the Defendant his Ducheſs for her Life, and afterwards to his Grandſon the now Duke; and appointed the Defendant the Ducheſs his Executrix, without making any expreſs Diſpoſition of the Surplus.

The Queſtion was, whether the Ducheſs the Executrix ſhould have the Surplus, or whether it ſhould go according to the Statute of Diſtribution?

And after ſolemn Argument, Lord Chancellor *Cowper* decreed the Surplus to be diſtributed among the next of Kin, upon the Authority of *Foſter* and *Munt*'s Caſe (*a*), reſolved in the Houſe of Lords: The Reaſons of which Reſolution were, that where the Teſtator gives Part of his perſonal Eſtate to his Executor, this

(*a*) Vide 1 Vern. 473. & ante p. 8.

this excludes him from the reſt; for that the Executor cannot have *all* and *ſome*; ſo that as to the Surplus the Teſtator dies inteſtate, and it ſhall be diſtributed.

And though it was objected, this was only the *Uſe* of the Plate deviſed, and not the *Plate itſelf*; his Lordſhip ſaid, Still this was a Bequeſt of an intereſt out of the perſonal Eſtate, and the ſmaller it was, the more it ſhewed that the Kindneſs of the Teſtator towards the Legatee was ſmall. However, the Smallneſs of the Bequeſt was not material; for an expreſs Legacy of 5 *l.* to an Executor, excluded him from the Surplus as ſtrongly as a Legacy of 25 *l.* and 25 *l.* as much as 2500 *l.* and ſo *ad infinitum.*

Secondly, With regard to the Objection of this being the Caſe of a *Wife*, the Court took Notice that there were not wanting (*a*) Inſtances of the Surplus being diſtributed, even in ſuch Caſes; and that it would occaſion great Incertainty, if the Nearneſs of the Relation ſhould make a Difference; for then, where the Brother, Siſter, Son, Nephew, *&c.* were made Executors, and alſo expreſs Legatees, each of theſe Caſes muſt create new Points, and ſo it would be impoſſible to know where to ſtop.

(*a*) Vide ſeveral Inſtances of this Kind cited in the Caſe of *Farrington* verſus *Knightley*, p. 544.

Thirdly, To what had been urged, that the Teſtator could not be ſaid to die Inteſtate as to the Surplus, when he had made an Executor (*b*) and by expreſs Words had ſaid, [This is my Will.] The Caſe of *Foſter* and *Munt* was ſaid to be liable to the ſame Objection. It was allowed, that had there been plain Proof of the Teſtator's declaring or intending his Wife to have the Surplus, this would have intitled the Wife thereto; even though ſuch Proof were but Parol Proof; for

(*b*) *Farrington* verſus *Knightly*, ubi ſupra.

Where the Surplus is not diſpoſed of by the Will, Parol Proof may be admitted to ſhew that the Teſtator intended to give the Surplus to his Executor, it being only to rebut an Equity ariſing by Implication in Favour of the next of Kin.

for the Wife, as Executrix, had the legal Title to the Surplus; and this Parol Proof would be only to rebut an Equity ariſing to the next of Kin, by reaſon of the expreſs Legacy given to the Executrix.

Vide the preceding Caſe.

But that the Proof in this preſent Caſe, of the Duke's Intent, was altogether doubtful and uncertain; [which was however allowed to be read.]

(*a*) 2 Vern. & vide ante p. 9.

The Court alſo admitted the Caſe of the *Counteſs* (*a*) *of Gainsborough* verſus *Earl of Gainsborough*, where the late Lord *Gainsborough* made the Counteſs his Executrix, and inſtructed the Counſel that drew the Will, to inſert therein a Deviſe of the Surplus of the perſonal Eſtate to the Counteſs, and the Counſel declar'd that it was unneceſſary, for that ſhe would have it of Courſe as *Executrix*; upon which it was decreed that the Counteſs ſhould have the Surplus; it being unreaſonable that the Executrix ſhould ſuffer by the Obſtinacy of the Counſel, and by his Refuſal to follow his Inſtructions.

But afterwards, in the principal Caſe, on an Appeal brought by the Ducheſs the Executrix *in Domo Procerum*, this Decree was reverſed; Lord *Guernſey* and other Lords declaring, that the Reaſon, upon which the former Decree of *Foſter* and *Munt* (*b*) was grounded, was the Fraud, and the Will's being drawn at a Tavern.

(*b*) Sed vide p. 544. *Farrington* verſus *Knightley*, where, by the better Opinion, no Fraud was proved in that Caſe.

(*c*) 2 Vern. 675.

And upon the Decree of Reverſal in the Houſe of Lords, Lord Keeper *Harcourt* founded his Decree in the Caſe of *Ball* and *Smith* (*c*) 1712.

Philips verſus *Carew*.

Caſe 28.

Bill lies to perpetuate Teſtimony before Trial, on Affidavit annexed that the Plaintiff's Witneſſes were infirm and unable to travel.

THE Bill was brought to diſcover a Title to Land, and for an Account of the Profits, and to perpetuate Teſtimony, *&c.*

The Defendant anſwered as to the Title, and demurred as to perpetuating Evidence, in regard the Plaintiff might bring his Ejectment, and examine his Witneſſes at the Trial.

And upon Affidavit that the Plaintiff's Witneſſes were infirm, and unable to travel, the Demurrer was over-ruled by the Maſter of the Rolls, and afterwards by the Lord Chancellor on a Rehearing. But it was admitted by the Lord Chancellor, that without ſuch an Affidavit, the Demurrer would have been good, it being a common Suggeſtion in a Bill; but when ſworn, if ſuch a Demurrer ſhould be allowed, it might introduce great Inconveniencies and Hardſhips, and a Failure of Juſtice.

DE
Term. Paſchæ,
1710.

Caſe 29.
Lord Chancellor Cowper.
Salk. 158.
2 Vern. 652.

Duke of Hamilton & Ux' verſus *Lord Mohun.*

Husband before Marriage covenants to releaſe his Wife's Guardian of all Accounts, not binding.

DUKE *Hamilton* married the Daughter and Heireſs of the Lord *Gerrard*, and the Articles of Marriage were agreed on with great Deliberation, one of which was, that Duke *Hamilton* ſhould within two Days after Marriage, for the Peace of the Family, releaſe to the Lady *Gerrard* (being the Mother and Guardian of the young Lady) all Accounts of the meſne Profits of the Eſtate; it being inſiſted upon by the Mother at that Time, and admitted by the Duke, that the Charge of the Education of the young Lady, and the Intereſt paid by the Mother upon a Mortgage of good Part of the Eſtate, which had been diſcharged by her as Guardian, would come to as much as the Profits of the Eſtate.

Alſo it was admitted by the Parties, that the Mother was intitled to her Dower of a Third of the Eſtate, which was in Mortgage for a Term of Years, but the Mortgagee had never entered upon the Premiſſes.

ſes. And in the Marriage Articles the Duke bound himſelf in the Penalty of 10,000 *l.* to the Lady *Gerrard*, for the giving this Releaſe within the ſaid Space of two Days after the Marriage.

Duke *Hamilton* was ſued upon theſe Articles at Law, and brought his Bill in Equity to be relieved againſt them, and for an Account of the meſne Profits.

Firſt, It was urged for the Defendant, who was Executor to Lady *Gerrard*, that here was no Surpriſe or Miſrepreſentation, but a very ſolemn Agreement, and which tended to the Peace of the Family. *Secondly*, That if the Duke had, *after the Marriage*, given ſuch Releaſe, Equity would not have relieved againſt it; and for the ſame Reaſon it ought not to relieve againſt a Covenant for the giving ſuch Releaſe. *Thirdly*, That if Agreements (though upon good Conſideration and Deliberation) could not be made, it might turn to the Diſadvantage of Infants; for then no Guardian could be ſecure from Suits, which would end in diſcouraging all Treaties of Marriage on Behalf of thoſe that were in Wardſhip to them. But,

Lord Chancellor ſaid, That admitting there was no Surprize in the gaining of this Covenant from Duke *Hamilton*, (as there ſeemed to be none) it being agreed upon after great Deliberation, and Advice of Counſel on both Sides:

And admitting there had been no Concealment of the Matters to be accounted for, (though in this Caſe the Particulars of what was to be releaſed did not ſo fully appear as they might and ought to have done:)

Yet this Covenant to make ſuch Releaſe ought to be ſet aſide, as it ſeemed to be extorted from the Duke by one who had a Power over the young Lady courted by him; by one who had a Power over her, as her Parent; which ought not to have been made uſe of in this Manner.

That it was as if the Mother ſhould ſay, You ſhall not have my Daughter, unleſs you will releaſe all Accounts.

That this Agreement was within the ſame Reaſon as a Marriage-Brokage Agreement, which had been ſo often condemned in Equity. (*a*)

(*a*) Salk. 156. 2 Vern. 392, 588, 652.

A Bond to *give* Money if ſuch a Marriage could be obtained, was ill: And,

By the ſame Reaſon, a Bond to *forgive* a Sum of Money muſt be ill alſo.

That the Caſe of a Mother or Guardian inſiſting upon Gain for conſenting to a Marriage, muſt be a much more frequent Miſchief, and in all Probability oftner happen, than an Agreement of this Nature with a third Perſon.

That it was moſt natural in this Caſe to treat with the Guardian; and to tolerate ſuch an Agreement, would be paving a Way to Guardians to ſell Infants under their Wardſhip; and the greater the Fortune was, the greater would be the Temptation to treat in this Manner with the Guardian, in order to ſuch a Marriage.

And though ſuch Releaſe, had it been given, *after Marriage*, by the Huſband, of all Accounts to the Guardian, might be good; it would be, becauſe if ſuch Releaſe were given after Marriage, it muſt be preſumed to be given freely; whereas this Covenant could not be ſuppoſed to be made freely, in regard the Duke might reaſonably apprehend, he muſt have loſt the young Lady, if he had refuſed the Covenant.

That this was within the common Caſe of Equity's relieving an Heir againſt any private Agreement with his Father, upon the Marriage of the Heir; as where the Father covenants to ſettle an Eſtate on the Marriage, and the Heir privately agrees to repay (*a*) back ſo much out of it to the Father; the Heir is under the Awe of his Parent in ſuch Caſe, and not ſuppoſed to act freely; for which Reaſon a Court of Equity relieves againſt all ſuch private Agreements. And therefore Lord Chancellor relieved againſt this Covenant to give a releaſe.

(*a*) Vide the Caſe of *Sir Nicholas Butler* verſus *Sir Henry Chauncey*, cited in the Abr. of Caſ. in Chancery 89.

Secondly, As to the Point of Dower, it had been objected for the Plaintiff, that this was a Gift in Law, not in Equity, and that there could be no Dower of a Truſt, nor conſequently of a Truſt Term: And ſuppoſing a Judgment in Dower, had, in this Caſe, been recovered, yet there muſt have been a (*b*) *Ceſſet executio* during the Term; and it being ſo at Law, *Æquitas ſequitur Legem.* And Lady *Radnor* and *Vandebendy*'s Caſe was cited, *Caſes in Parliament* 69.

Husband ſeiſed in Fee mortgages for Years, and marries, the Mortgagee never enters; the Wife on the Death of her Husband ſhall be endowed.

(*b*) Salk. 291. & poſt p. 137. *Lady Williams* verſus *Sir Boucher Wray*.

But Lord Chancellor *contra:* There ought to be an Allowance of the third Part of the Profits for Dower to the Mother, or her Repreſentative. The Caſe of Lady *Radnor* verſus *Vandebendy* was, where there was a Purchaſer of the Lands, againſt whom the Dowreſs ſought Relief in Equity as to her Dower: Whereas

Here, when the Mortgagee never inſiſted to enter for his Mortgage, it would be hard that the Heir ſhould inſiſt upon it to prevent the Dower. Beſides, ſhe (had there been Occaſion) could have redeemed the Mortgage. And as to the Want of a formal Aſſignment of Dower, that is nothing in Equity; for ſtill the Right in Conſcience is the ſame: And if the Heir brings a Bill againſt the Mother for an Account of Profits, it is moſt juſt that a Court of Equity ſhould, in the Account, allow a Third of the Profits for the Right of Dower.

Note, 2 *Chanc. Caſes* 157. *Osbourn* verſus *Chapman* was cited as a ſtronger Caſe.

DE

DE
Term. S. Trinitatis,
1710.

Honor verſus *Honor*.

Caſe 30. *Lord Chancellor* Cowper.

2 Vern. 658.

ARticles were made before, and in Conſideration of Marriage, and entred into about twenty-five Years ſince, whereby Lands were agreed to be ſettled to the Uſe of the Huſband for Life, Remainder to the Wife for Life, Remainder to the Heirs of the Body of the *Wife* by the Huſband begotten, Remainder to the Huſband in Fee.

Articles and Settlement mentioned to be made in Purſuance thereof, were both made before the Marriage, but the Settlement varied from the Uſes in the Articles: Decreed to go according to the Articles.

Sometime afterwards (but before the Marriage) the Settlement itſelf was made, and recited the Articles; and *in Purſuance of the Articles* (for ſo it was mentioned in the Settlement) theſe Lands were limited to the Uſe of the Huſband for Life, Remainder to the Wife for Life, Remainder to the Heirs of the Body of the *Huſband* on the Wife to be begotten, Remainder to the Huſband in Fee.

The Marriage took Effect; and there was Iſſue one Son (the Plaintiff,) and the Huſband married again, and had ſeveral other Children.

It was proved that the Intent of the Parties was, that the Father ſhould have but an Eſtate for Life; and that it was taken in the Family, and by all the Relations, that the Father had no Power to ſell or charge the Eſtate.

The Father took up 500 *l.* on a Mortgage of the Premiſſes, having got the Son to join in a Fine without any Conſideration, and the Fee-ſimple and Equity of Redemption of the mortgaged Premiſſes were limited to the Father.

The Son brought his Bill to compel the Father to reconvey and reſettle the Premiſſes on the Son after his Death, and to make the Settlement purſuant to the Articles.

Lord Chancellor: It is a plain Miſtake in making the Settlement vary from the Articles:

The Articles are prudent Articles; and the Wife, though ſhe is to have an Eſtate-tail thereby, yet cannot bar it, but is reſtrained by 11 *H.* 7. And it was plainly intended that the Father ſhould not have a Power of defeating and ſtarving the Iſſue.

And the Articles being ſo, the Settlement, which is ſaid to be made purſuant thereto, ſhews there was no Alteration of the Intention, nor any new Agreement between the making of the Articles and the Settlement; and this appearing upon the Face of the Articles and Settlement, and in the plain Reaſon of the Thing, the Length of Time is immaterial.

Therefore decree the Defendant the Father, and his ſecond Wife, to join in a Conveyance to ſettle the Eſtate as by the Articles, (*viz.*) to the Father for Life, Remainder to the Plaintiff the Son in Tail. But as to the Mortgage, the Son having joined in it, this Court will not ſet it aſide; but let the Father keep down the Intereſt during his Life; and in regard the Defendant the Father inſiſts to take Advantage of this Miſtake, let the Conveyance be made at his Charge, and let him pay Coſts.

Harvey verſus *Harvey*.

Caſe 31.

2 Vern. 659.

Deviſe of a perſonal Eſtate to a Feme Covert for her ſeparate Uſe, without naming Truſtees: *Qu.* Whether good to bar the Huſband?

A. Having a Daughter married to the Defendant, by his Will deviſed his perſonal Eſtate to his Daughter, to hold to her particular and ſeparate Uſe, and died.

Afterwards the Huſband (Part of this perſonal Eſtate conſiſting of a Mortgage) agreed by Writing under his Hand, that the Wife ſhould enjoy it to her ſeparate Uſe.

And the Queſtion was, (here being no Truſtees to whom the Deviſe was made) Whether the Wife ſhould enjoy this perſonal Eſtate without its being intermeddled with by her Huſband?

Lord Chancellor: This is a great Queſtion, Whether the Huſband ſhall be compelled to let the Wife enjoy this perſonal Eſtate to her own Uſe?

What Circumſtances will undoubtedly make ſuch Will good.

For though it is objected, that the Teſtator had a Power to deviſe it ſo, and that his Intent was to make uſe of ſuch Power, yet it being given to a married Woman, and no Contract precedent or ſubſequent from the Huſband, that he will not intermeddle with it, the Huſband's Title to this Eſtate is ſubſequent to the Will; and the Intention being repugnant to the Rules of Law, (*viz.*) That a Feme Covert ſhould have a (*a*) Property in perſonal Goods; it ſeems to me to have ſome difficulty in it.

(*a*) Vide *Burton* verſus *Pierpoint*, 2 Vol. p. 78.

Wherefore let it be reſerved as a Caſe to be argued.

But as to the Mortgage, where the Huſband has contracted or declared under his Hand, that he would not intermeddle with it; though ſuch Declaration may be voluntary, yet it muſt be preſumed to proceed from a Senſe the Huſband had of the Teſtator's Intent that the Wife ſhould enjoy this Mortgage ſeparately; and to be founded on *Natural Juſtice*, though not on *Contract*. For which Reaſon, the Court was clearly of Opinion, that the Huſband ſhould be bound by this Agreement.

And Lord Chancellor ſaid, that if a real Eſtate were deviſed to a Feme Covert for her ſeparate Uſe, and a Declaration that the Huſband ſhould not intermeddle with the Profits, but that the Wife ſhould enjoy them ſeparately, he doubted this would be a repugnant Clauſe, and the Huſband would ſtill enjoy them.*

---

* It does not appear either by this Report, or that in *Vern.* nor even in the Regiſter's Book, what was Lord *Cowper*'s final Determination upon this Point; but the Caſe of *Bennet* verſus *Davis*, which was determined at the *Rolls* in *December* 1725, ſeems to have ſettled it.

Burridge verſus Bradyl.

Caſe 32. *Lord Chancellor* Cowper. *Cauſe by Conſent.*

Pecuniary Legacies, if Aſſets wanting, ſhall be paid in Average; but a Legacy given to a Wife, in Conſideration that ſhe releaſe Dower, ſhall be preferred.

A Man has a Wife and two Daughters, and by his Will deviſes 3,400 *l.* to be laid out by his Executors in the Purchaſe of Annuities in the Exchequer for 99 Years Term; and to be enjoyed by his Wife for her Life, ſhe releaſing her Dower; and after her Deceaſe, to go equally to his two Daughters; and bequeaths 1000 *l.* a-piece to his ſaid two Daughters, payable at their Age of 21, or Marriage; and dies, leaving very little more Aſſets than would pay the 3,400 *l.* which was to be laid out in the buying the Exchequer-Annuities.

So Money bequeathed to buy Land, or an Annuity, is as a ſpecifick Legacy, and ſhall not come in Average.

And objected, theſe were all pecuniary Legacies, and there being a Deficiency, they muſt all come into Average, and ſuffer alike; that Equality was the higheſt Equity: And it would be very hard if the Wife, who might marry again, ſhould go away with all, ſo that the Children might, in her Life-time, ſtarve, and be without any Subſiſtence.

Lord Chancellor: The 3,400 *l.* ſhall have the Preference; and if there be not Aſſets enough to pay the other Legacies, they muſt be loſt.

It is of ſome Weight, that theſe Annuities are to go to the Children after the Wife's Death; but eſpecially as the Wife is a Purchaſer of the Annuities for her Life, by her releaſing her Dower; and for that Money ordered by Will, or articled to be laid out in an Annuity, or in Land, is in Equity looked upon as an Annuity, or Land, and conſequently to be taken for a ſpecifick Deviſe, and not a pecuniary Legacy; it is therefore to be preferred before a pecuniary Legacy. (*a*)

D E

(*a*) See the Authority of this Decree queſtioned by Lord *Parker* in the Caſe of *Hinton* ver. *Pinke*, p. 541.

DE

Term. S. Michaelis,

1710.

Caſe 33.
Lord Keeper Harcourt.
Salk. 680.
Truſtees for preſerving contingent Remainders join in a Conveyance before the Birth of a Son; this a Breach of Truſt, and Equity will relieve.

Pye verſus *Gorge*.

IT was declared by the Lord Keeper *Harcourt*, that where there were Truſtees appointed by Will to preſerve contingent Remainders, and they, before the Birth of a Son, joined in a Conveyance to deſtroy the Remainders, this was a plain Breach of Truſt; and any Perſon taking under ſuch Conveyance, if voluntarily, or having Notice, ſhould be liable to the ſame Truſts.

And tho' it was objected, that this had been only *obiter* ſaid in Equity, and that there never was any Precedent of a Decree in ſuch a Caſe:

Lord Keeper ſaid, it was ſo very plain and reaſonable, that if there was no Precedent in this Caſe, he would make one.

But this was not the principal Caſe, which was, That there was a Son born before the Conveyance by the Truſtees, and the Eſtate being in Mortgage the

Son came into Equity, after the Death of the Tenant for Life, to redeem.

Agreeably to what was thus declared by Lord *Harcourt*, it has been ſince expreſly decreed by Lord Chancellor *King*, aſſiſted by Lord *Raymond* and Chief Baron *Reynolds*, in the Caſe of (*a*) *Manſel* verſus *Manſel*, *Dec.* 1732. which was the Caſe of a voluntary Settlement; and where the Court unanimouſly delivered it as their Opinion, that nothing in common Juſtice, Senſe, and Reaſon, could be a plainer Breach of Truſt, than that thoſe who were appointed Truſtees to the Intent to preſerve the Eſtate to the firſt Son, (and for that Purpoſe only,) ſhould, directly (*b*) contrary to their Truſt, join in the Deſtruction of the Settlement.

(*a*) Vide this Caſe 2 Vol. 610.

(*b*) Vide poſt 358. *Baſſet* verſus *Clapham*, and *Elſe* verſus *Osborn*, 388.

But where there is Tenant for Life, Remainder to the firſt Son, *&c.* and no Truſtees to preſerve contingent Remainders, in ſuch Caſe, if Tenant for Life, by Fine or Feoffment, deſtroys the Remainders, there being no Truſtee, there can be conſequently no Breach of Truſt; and this being the Law, Chancery will not interpoſe: But then, as this was a Hardſhip at Law, to prevent which, the Method of appointing Truſtees was invented, ſo it is reaſonable that the Truſtees, when they let in this Hardſhip by violating the Truſt repoſed in them, ſhould themſelves be liable for the ſame; but if the Conveyance be voluntary, or if there be Notice of the Truſt, ſuch Truſt ſhall follow the Land.

Benſon verſus *Benſon.*

Caſe 34.
Sir John Trevor *Maſter of the Rolls.*

Where Money is agreed by Articles to be laid out in Land, the Party, who would have the ſole Intereſt in the Land when bought, may elect to have the Money paid to him, and that it ſhall not be laid out in Land.

TWO thouſand Pounds (whereof 1500 *l.* were the Wife's Portion, and 500 *l.* the Huſband's Money,) were agreed, by Articles before Marriage, to be inveſted in a Purchaſe of Lands, to be ſettled upon Huſband and Wife for their Lives, Remainder to the Heirs of the Body of the Wife by the Huſband, Remainder to the Heirs of the Huſband.

The Huſband receives the whole 2000 *l.* the Wife dies leaving a Son and three Daughters; after which the Huſband dying Inteſtate, the eldeſt Daughter takes out Adminiſtration to the Father.

The Son brings a Bill againſt his Siſter (the Adminiſtratrix) to have the Money paid to him, electing that it ſhould not be laid out in Land, and ſettled as had been agreed by the Articles.

How cont': This may be a Prejudice to the Siſters, who, if the Lands were to be ſettled, and afterwards the Son ſhould dye without Iſſue, and without levying a Fine, would be intitled to them under the Contingency; and there can be no Reaſon to deprive the Siſters of any Contingency; and this Bill, tho' ſaid to be brought to *execute* a Truſt, does, at the ſame Time, ſeek to *break* it.

Cur: A Fine cannot be levied of Money agreed to be laid out in a Purchaſe of Land to be ſettled in Tail; but a Decree can bind ſuch Money equally as a Fine alone could have bound the Land in this Caſe, if bought and ſettled; and in regard the Plaintiff the Son would have the intire Intereſt in the Lands when purchaſed and ſettled, and the abſolute Power over them, and that a Court of Equity will not decree a (*a*) vain Thing:

(*a*) Poſt *Seeley* verſus *Jago* 389, and *Short* verſus *Wood*, 471.

Viz. Decree a Purchaſe and Settlement to be made which the Son, the next Moment, by a Fine only, may cut off; therefore ſince the Son elects to have the 2000 *l.* let him take it, and let the Adminiſtratrix be indemnified.

Then it was objected by Mr. *How*, that this was not as a Debt by Specialty from the Inteſtate, but only by ſimple Contract, there being no expreſs Contract from the Inteſtate by the Articles to pay it; ſo that it was at moſt but a Breach of Truſt, as Money received and miſapplied. *Sed per Cur'*:

What Debt a Specialty, and what a ſimple Contract.

It is a Debt by Specialty, and to be paid in that Degree; for it is agreed by the Articles (to which the Huſband was a Party) that it ſhall be, within ſuch a Time, laid out in Land; and the Huſband having received it, and not having laid it out, has broken that Agreement; and an Agreement under Hand and Seal, by Deed, is a Covenant, and conſequently a Specialty.

Vide 2 Vol. 414, in *Deg* verſus *Deg*.

DE

Term. S. Hillarii,

1710.

Caſe 35.
Lord Keeper Harcourt.
2 Vern. 668.
A. on his Marriage aſſigns a Term for 1000 Years, in Truſt for himſelf for Life, Remainder to his Wife for Life, Remainder to the Heirs of the Bodies of the Huſband and Wife, Remainder to the Huſband's right Heirs; the Wife dies leaving Iſſue; the whole Term veſts in the Huſband, and he may aſſign it.

Webb & al' verſus *Webb.*

EDward Webb the Defendant's Grandfather and his Truſtees, in Conſideration of a Marriage between *Thomas* his Son and *Anne* his then Wife, and 350*l.* Portion, did aſſign divers Lands in *Horſley* in *Glouceſterſhire* to Truſtees for the Remainder of a Term of 1000 Years, upon Truſt to permit the Son to enjoy the ſame ſo long as he ſhould live; and after his Deceaſe, then to *Anne* his Wife as long as ſhe ſhould live; and after their Deceaſe, to permit the Heirs of the Bodies of the ſaid *Thomas* the Son and *Anne* his Wife to be begotten, to hold the Premiſſes during the Remainder of the Term; and for Want of ſuch Iſſue, to be enjoyed by the right Heirs of the ſaid *Thomas* the Son.

Thomas and *Anne* had ſeven or eight Children; and he, having ſurvived his Wife, and ſettled about two Thirds of his Eſtate on the Defendant his eldeſt Son, (to the Value of about 1100*l.*) and being indebted about 300*l.* made a Mortgage of the Premiſſes for ſecuring of that Money; and in order thereunto, took out Adminiſtration to the laſt ſurviving Truſtee; and afterwards aſſigned this Term to the Plaintiffs upon Truſt that they ſhould ſell the ſame, and in the firſt place pay off the Mortgage; and then pay the Remainder to his Executors, to be diſpoſed of by them for his younger Children, as he ſhould appoint by his Will.

After this he made his Will, and the Plaintiffs *Baker* and *Seager*, *&c.* Executors, and ſhortly after died.

The Plaintiffs the Truſtees and Executors, being diſturbed by the Defendant, brought their Bill for the Execution of the ſaid Truſt and Will.

The Defendant by his Anſwer ſet forth the firſt Deed of Truſt, and inſiſted, that he, as eldeſt Son and Heir of his ſaid Father and Mother, was intitled to the Premiſſes by Virtue of that Settlement, and that he ought to have the ſame, notwithſtanding his Father's Mortgage, Aſſignment, and Will.

The Cauſe was heard before the Maſter of the Rolls, who diſmiſſed the Plaintiffs Bill.

But upon Petition to the Lord Keeper it was reheard by him, who took Time to conſider of it; and this Day being appointed for Judgment, Mr. *Vernon* (who was abſent at the Rehearing by Reaſon of Sickneſs,) was heard for the Defendant;

And inſiſted ſtrongly, that this Caſe was exactly the ſame as that of (*a*) *Peacock* and *Spooner*, where a Term for Years was aſſigned in Truſt for one for Life, Remainder to the Heirs of his Body; which Cauſe was heard before Lord Chancellor *Jeffereys* in (*a*) 2 Vern. 43.

1688. who was of Opinion that the Tenant for Life had the whole Term, and decreed accordingly; but afterwards coming on to be reheard before the Lords Commiſſioners, (*a*) they took it, that the Words [Heirs of the Body] were a deſcription of the Perſon who was intended to take, and reverſed Lord *Jefferey*'s Decree; and upon an Appeal to the Houſe of Lords, the Commiſſioners Decree was affirmed.

(*a*) 2 Vern. 195.

Alſo in the Caſe of *Ward* verſus *Bradley*, (*b*) the Truſts of a Term were limited to *Cole* for ninety-nine Years, if he ſhould ſo long live, Remainder to the Heirs of his Body begotten on his Wife; *Cole* diſpoſed of the whole Term, and died leaving Children, who brought their Bill, and had a Decree in their Favour.

(*b*) 2 Vern. 23.

Sir *Joſeph Jekyll* for the Plaintiffs: The Rule in Equity is the ſame, as to the Truſt of a Term, as it is at Law in Caſes of a Freehold; ſo that wherever, upon a Limitation of a Freehold, a Man by a Fine or Recovery can bar his Iſſue, if there is the ſame Limitation of the Truſt of a Term, in that Caſe alſo the Party may diſpoſe of the whole Term.

There is a great Difference between our Caſe and that of *Peacock* verſus *Spooner*; in that Caſe the Limitation was for ſo many Years as the Man ſhould live, and then to his Wife in the ſame Manner, then to the Heirs of the Body of the Wife begotten by the Huſband; now this was the Eſtate of the Huſband, and was a Settlement made by him, and therefore it was conſidered as in the Caſe of a Freehold (*c*) upon the Statute of *H.* 7. *ca.* 20. for preventing Womens aliening the Eſtates of their Huſbands after their Deaths: For there the Wife, with a ſecond Huſband, was endeavouring to defeat the Children of the firſt Huſband; and this was a

(*c*) Vide poſt 370. *Hayter* verſus *Rod.*

great Ingredient in the Caſe to induce the Lords to go ſo far.

Lord Keeper: I never heard it ſaid, before the Caſe of *Peacock* verſus *Spooner*, that the Limitations of a Term in Equity differed from the Caſe of a Freehold at Common Law.

That Caſe is the only one which in any Manner reſembles this; but as it ſeems far from being exactly parallel, I do not think my ſelf tied up by it.

Now that Caſe differs from this in ſeveral material Circumſtances:

1*ſt*, The Limitation there, was to the Heirs of the Body of the Wiſe; here to the Heirs of the Bodies of the Husband and Wiſe.

2*dly*, There the Party had not the legal Eſtate, but the ſecond Husband took out Adminiſtration to the firſt, and imagining that he had a Right to the whole Term, brought his Bill againſt the Truſtees to compel them to aſſign.

In the Caſe before me, the Party aliening has the legal Eſtate.

3*dly*, In that Caſe there was no Diſpoſition;

Here is a Mortgage and Diſpoſition for younger Children, which, were the Plaintiffs not to prevail, muſt be defeated;

And therefore, there being theſe material Variations between the one Caſe and the other, I think I am at Liberty to determine this, as if the Caſe of *Peacock* verſus *Spooner* was out of the Way. I am ſure, I have often heard it ſaid by this Court, that the Caſe of *Lady Radnor* verſus *Vandebendy*, was of a Purchaſer; (*a*) and that in any Caſe which varied from it, as where there was no Purchaſer, they would vary too.

(*a*) Ante 111.

The Decree at the Rolls muſt be reverſed; and the Truſtees be let into a Redemption of the Mortgage, and be decreed to perform the Truſts.

It ſeems in this Caſe there were 40 *l.* given the Defendant by the Father's Will, on Condition that he did not diſturb the Truſtees, and they coming now to have an Execution of the Truſt, and that he might either join with them in a Sale, or loſe his Legacy:

Per Cur': If he will join with them, he ſhall have the 40 *l.* Legacy; if not, then he ſhall forfeit it.

Father gives his Son 40 *l.* upon Condition that he does not diſturb his Truſtee; on the Truſtee's applying for an Execution of the Truſt, Son decreed either to join in a Sale of the Premiſſes, or elſe to forfeit his 40 *l.* Legacy.

Lady Williams, Relict of Sir William Williams, verſus *Sir Bourchier Wray.* On a Bill of Review.

Caſe 36.

Lord Keeper Harcourt.

Dower allowed, tho' there was a Truſt-Term ſubſiſting.

THE Plaintiff brought a Writ of Dower, and recovered Judgment by Default; the Defendant Sir *B. Wray* preferred his Bill to be relieved againſt the Judgment in Dower, on this Equity, (*viz.*) that as to Part of the Lands, (the five Pariſhes in the Pleadings mentioned,) tho' the Plaintiff the Lady *Williams* had recovered Judgment in Dower, yet there was a ſubſiſting Term for ninety-nine Years in theſe Lands, prior to her Marriage; and that the legal Eſtate of this Term was in one Mr. *Bulkley*, as a collateral Security for his quiet Enjoyment of certain Lands called *Lecquidiſſa*; that ſubject to this collateral Security, the Term was declared in Truſt to attend the Reverſion and Inheritance which was in Sir *William Williams* the Plaintiff's late Husband; and that Sir *William Williams* being thus ſeiſed, and having intermarried with the Plaintiff, did, by his Will, deviſe theſe Lands to Sir *B. Wray* for Life, Remainder to his firſt and every other Son in Tail Male, with Remainder to his Brother Mr. *Chicheſter Wray* in like Manner, with Remainder in Fee-ſimple to the late King *William*, and that the ſaid Mr. *Bulkely*, having been interrupted in the Enjoyment of the *Lecquidiſſa* Eſtate, was decreed to have Satisfaction out of the ninety-nine Years Term of the Land in the five Pariſhes.

28 *June* 1700. * This Cauſe was heard before the Lord Keeper *Wright*, who declared, that the now Plaintiff the Lady *Williams* was not dowable of theſe Lands in the five Pariſhes, there being a Truſt-Term ſubſiſting in them

* Precedents in Chan. 151.

them, prior to her Marriage; and that Equity would not aid a Dowreſs; for that no Dower ought to be of a Truſt, and if not of a Truſt in Fee-ſimple, by the ſame Reaſon, the Plaintiff was not to be aided againſt a Truſt-Term: Wherefore he decreed Mr. *Bulkley* to produce the Deed at a Trial at Law, to enable Sir *B. Wray* to recover the Poſſeſſion of theſe Lands in the five Pariſhes, and that the now Plaintiff the Lady *Williams* ſhould account for the Profits thereof.

21 *March* 1701. upon the Re-hearing of this Cauſe before the Lord Keeper *Wright*, and upon Deliberation and Time taken to conſider of it, and on Peruſal of the Bill, which was left with his Lordſhip, he affirmed his former Decree.

At the Re-hearing, the now Plaintiff the Lady *Williams*'s Counſel cited (*inter al'*) the Caſes of *Porter* verſus *Hammond*, *Snell* (*a*) verſus *Clay*, *Pemberton* verſus *Jarvell*; and inſiſted, that Sir *Bourchier* who was but a Volunteer, ſhould not, in Equity, be relieved againſt a Dowreſs; and that this Caſe was different from that of Lady *Radnor* and *Vandebendy*, (*a*) affirmed in the Houſe of Peers, in regard *Vendebendy* was a Purchaſer; alſo that here, if the Judgment in Dower was irregular, Sir *B.* ought to proceed and reverſe it at Law.

(*a*) 2 Vern. 324.

(*a*) Parl. Ca. 69.

To which it was anſwered, that if Lady *Williams* had been Plaintiff in the original Bill in Equity, ſhe could not have been relieved; foraſmuch as the ninety-nine Years Term muſt have ſubſiſted, as well for the Benefit of the Deviſee, as of the Heir at Law. That this was the ſame, in Reaſon, with the Lady *Radnor*'s Caſe, and that the Term of ninety-nine Years was prior to the Marriage, and ſo the Husband only ſeiſed of the Reverſion in Fee during the Coverture; that as to *Vandebendy*'s being a Purchaſer, he was ſo with full Notice of Dower, and got in the Term to protect him againſt the Dowreſs;

and

and therefore, having Notice, was to be conſider'd only as a Volunteer; that in Dower, where the Huſband was ſeiſed of the Reverſion in Fee expectant upon a Term for Years, the Plaintiff might indeed (*a*) recover Judgment, but the Writ of Seiſin was not to be awarded until the Term ended.

(*a*) The Plaintiff recovers, but there is a *Ceſſet executio* during the Term. Salk. 291. & vide ante 121.

That Sir *Bourchier* was proper in Equity; for without the Aſſiſtance of this Court he could not go to Law, not having the Deed, which was in the Poſſeſſion of his Truſtee Mr. *Bulkley*; and that if Mr. *Bulkley* had brought an Ejectment, he muſt have recovered againſt the Plaintiff the Lady *Williams*; and if he muſt have recovered, who was Sir *Bourchier*'s Truſtee, it was ſurely no leſs reaſonable, that Sir *Bourchier* the *Ceſtuique Truſt* ſhould recover.

After this Re-hearing, Proceedings from Time to Time were had before the Maſter, who, at Length, ſettled an Account of the Profits taken by Lady *Williams* at 1438 *l.* and that Report, after Exceptions taken to it, was confirmed.

But now Lady *Williams* brought her (*b*) Bill of Review; and on ſolemn Argument before Lord Keeper *Harcourt*, he reverſed Lord *Wright*'s Decree; and ordered that the Plaintiff Lady *Williams* having recovered Dower at Law, this Truſt-Term that Sir *B. Wray* had ſet up, ſhould not ſtand in her Way in Equity.

(*b*) It appears there was firſt a Demurrer put in to this Bill of Review, which being over-ruled, the Defendant ſubmitted, and a Decree was made by Conſent, fixing a Sum for the Arrears of Dower, and delivering up the Poſſeſſion to the Plaintiff. Vide poſt the Argument of the Maſter of the Rolls (Sir *Joſeph Jekyll*) in the Caſe of *Banks* verſus *Sutton*, 632.

DE

Term. Paſchæ,

1711.

Caſe 37.
Lord Keeper Harcourt.

Captain of a Ship dies leaving Money on Board, the Mate becomes Captain and improves the Money, he ſhall, on Allowance made him for his Care in the Management of ſuch Money, account for the Profits, and not the Intereſt only.

Brown verſus *Litton.*

THE Plaintiff's Teſtator was Captain of a Ship, and being in his Voyage beyond Sea, had 800 Dollars on board the Ship, which he intended to inveſt in Trade; the Captain died, and the Defendant (who was Mate of the Ship) becoming Captain, took theſe 800 Dollars, and inveſting them in Trade made great Improvements thereof; but on his Return to *England*,

The Executrix of the firſt Captain brings a Bill againſt him for an Account.

The Defendant admitted the Receipt of the Money, and offered to repay the ſame with Intereſt; whereas the Plaintiff inſiſted on the Profits produced in Trade, and the ſeveral Inveſtments that had been made therewith.

Object. The Defendant having traded with this Money, it was at his Risk and Peril; and as, had it been loſt in Trade, the Defendant muſt have born that Loſs; ſo it is reaſonable, on the other Hand, that the Profit which has been made of it ſhould belong to him; as where an Executor puts out Money without the Decree of the Court, if this be loſt, it is at his Peril, and therefore he ought to have the Intereſt.

But Lord Keeper ſaid, that the Caſe of an Executor's putting out Money without the Indemnity of a Decree, if it were on a real Security, and one that there was no Ground at that Time to ſuſpect, had not been ſettled; tho' it was his Opinion, that the Executor, under ſuch Circumſtances, was not liable to anſwer for the Loſs, and ſo ſhould account for the Intereſt.

Where an Executor puts out Money, though without the Indemnity of a Decree, upon a real Security, which there was no Reaſon then to ſuſpect, but afterwards ſuch Security proves bad, he is not accountable for the Loſs, any more than he would have been intitled to the Profits, had it continued good.

But that he took the Defendant, in this Caſe, to be more like a Truſtee than an Executor, and if ſo, he ought clearly to account for the Profits made of the Money; that the primary Intent in carrying abroad this Money was, to inveſt it in Trade, and not to return with it home again; and therefore, the Defendant having obſerved the Intent of the Teſtator in trading therewith, and having taken ſuch a prudent Care in the Management of it, as (it might be preſumed) he would have taken of his own Money, his Lordſhip apprehended the Defendant would not have been liable to anſwer for any Loſs that might have happened; and compared it to the Caſe of two joint Traders, where, if one dies, and the Survivor carries on the Trade after the Death of the Partner, the Survivor ſhall anſwer for the Gain made by this Trade. The Court obſerved, that this being an Iſland, all imaginable Incouragement ought to be given to Trade, and ſuch Conſtruction was for the Benefit of him who carried out this Money with that Intent; and there was no Reaſon that his Death ſhould ſo far injure his Family

mily and Relations, as to deprive them of the Benefit which might accrue from it in the way of Trade. But that, to recompence the Defendant for his Care in trading with it, the Maſter ſhould ſettle a proper Salary for the Pains and Trouble he had been at in the Management thereof; and in the mean Time Coſts to be reſerved.

Caſe 38. *Lord Keeper* Harcourt. 2 Vern. 670.

Bale verſus *Coleman*.

One deviſes his Lands for Payment of his Debts, and then to *A.* for Life, with Power to make Leaſes, *&c.* Remainder to the Heirs Male of the Body of *A.* tho' this be but the Deviſe of a Truſt, and executory, and expreſſed to be to *A.* for Life, yet it is an Eſtate-tail in *A.* barrable by a Fine and Recovery. *Secus* in caſe of Marriage-Articles to ſettle an Eſtate on *A.* for Life, Remainder to the Heirs Male of his Body; this being an Agreement to do a future Act, and in which the Iſſue are particularly conſidered and looked upon as Purchaſers.

ONE deviſed Lands to four Perſons and their Heirs for Payment of Debts, and afterwards to the Uſe of them and their Heirs; after which, by a Codicil he deviſed, that his Will ſhould ſtand, ſaving, that when his Debts were paid, *A.* who was one of the four Deviſees in the Will, ſhould have his Share of the Lands to himſelf for Life, with a Power to make Leaſes for ninety-nine Years, determinable on three Lives, Remainder to the Heirs Male of his Body, Remainder over.

A. levied a Fine and ſuffered a common Recovery to the Uſe of himſelf and his Heirs, and brought a Bill for a Partition, praying that the other three might join in a Conveyance of a divided fourth to him in Fee.

And this coming on to be heard by Lord Chancellor (*a*) *Cowper*, and the only Queſtion being, whether by the Codicil *A.* was intitled to an Eſtate in Tail, or for Life only?

(*a*) 26 *July* 1709.

His Lordſhip was of Opinion *A.* ought to be Tenant for Life only, with Remainder to his firſt, *&c.* Son in Tail Male, with Remainder over; for that it being the Caſe of a Will, and an expreſs Eſtate for

Life being limited to *A.* Remainder to the Heirs Male of his Body, it differed (as he conceived) from an immediate Deviſe; that it was rather to be looked upon as an executory Deviſe, to take Effect after Debts paid, which Debts were conſiderable; or in Nature of Marriage Articles for the Conveying and Settling an Eſtate to one for Life, with Remainder to the Heirs Male of his Body; in which Caſe, it had been often decreed, that the Conveyance or Settlement ſhould not be made purſuant to the Words, but the Intention of the Parties, (*ſcil.*) to *A.* for Life, Remainder to the firſt, &c. Son in Tail Male ſucceſſively; that it would croſs and fruſtrate the Intent of the Teſtator, to impower *A.* to bar his Iſſue and the Remainder-Man; beſides, that the enabling of *A.* to make Leaſes, ſeemed to imply very ſtrongly that he was to have no Power to diſpoſe of the Inheritance.

But the ſame Cauſe coming on (*a*) this Day before Lord Keeper *Harcourt* on a Re-hearing, it was urged againſt the Decree, by *Powis* Queen's Serjeant, and *Northey* Attorney General.

(*a*) 28 *April.*

Firſt, That if the Caſe were only of a Deviſe of Lands to one for Life, Remainder to the Heirs Male of his Body, this plainly would be an Eſtate-tail; and if it would be ſo at Law, it muſt be highly inconvenient that the Limitation of Lands in the very ſame Words, and by the ſame Will, ſhould be conſtrued to give one Kind of Eſtate in one Court, on one Side of *Weſtminſter-Hall*, and to create a different Kind of Eſtate in another Court, on the other Side of *Weſtminſter-Hall*: That the Lord Chancellor *Nottingham*, in the Duke of *Norfolk*'s Caſe, had laid it down as a Maxim, that (*b*) Truſts ſhould be conſtrued by the ſame Rules as legal Eſtates.

(*b*) Vide ante 35, 109.

Secondly, That it was not material what the Intention of the Party was in this Caſe, if that Intention was contrary to the plain Rules of Law: And it was a plain Rule of Law, that if an Eſtate were limited to one for Life, with Remainder to the Heirs (or Heirs Male) of his Body, this was an Eſtate-tail executed.

Deviſe to one for Life, Remainder to the *Iſſue* of his Body, is an Eſtate-tail.

Thirdly, That the Caſe of *King* verſus *Melling* in 2 *Lev.* 58. and 3 *Keb.* 42, *&c.* was much ſtronger; where an Eſtate was deviſed to one for Life, with Remainder to the Iſſue of his Body; yet this was adjudged an Eſtate-tail; though the Word *Iſſue* was a much more improper Word to convey an Inheritance, than the Word *Heirs*.

A Power of making Leaſes does not prevent the Deviſee's Eſtate from being an Eſtate-tail; for by this Power the Deviſee without Fine or Recovery may make Leaſes to bind the Remainder or Reverſion; whereas by the Statute of *H.* 8. Tenant in Tail can only make Leaſes to bar the Iſſue, and not the Remainder or Reverſion.

Fourthly, That the Power to make Leaſes did not reſtrain the Eſtate to be but an Eſtate for Life. In *King* verſus *Melling* there was a Power to the Deviſee for Life to make a Jointure, notwithſtanding which, the Remainder limited to the Iſſue of his Body made it an Eſtate-tail; and Mr. Attorney General *Northey* ſaid, that he had known very eminent Men give that Power even to a Tenant in Tail, and it had its Uſe, in regard that by the Statute of *H.* 8. the Power of Leaſing given to Tenant in Tail would bind only the (*a*) Iſſue, and not the Remainder or Reverſion; but now by this expreſs Power, the Leaſes made in Purſuance thereof would bind the Remainder or Reverſion, as well as the Iſſue; ſo that ſuch Power went further than the Power given by the Statute, and might be of Service, to prevent the Breaking into the Eſtate-tail by a Fine and Recovery.

(*a*) 1 Inſt. 44.

Fifthly, As to the Objection, that this was a Deviſe executory and not executed, it being to take Effect after Debts paid; It was anſwered, that ſuppoſing the Debts were not then paid, yet whenever they ſhould be paid, it would be the ſame Thing as if no ſuch Debts had been, and conſequently as a preſent Deviſe.

And

And Sir *Thomas Powis* very much inſiſted upon the Caſe of (*a*) *Legate* verſus *Sewell*, where Money was deviſed to be laid out in Land, and to be ſettled on a Man for Life, Remainder to the Heirs Male of his Body, and the Heirs Male of the Body of every ſuch Heir Male ſucceſſively, which Caſe was ſent by the Lord Chancellor *Cowper* to the Judges of *C. B.* to determine what Eſtate this would have been in Caſe it had been a Deviſe of Land; and it was adjudged an Eſtate-tail. (*a*) Ante 87.

Lord Keeper *Harcourt*: This being the Caſe of a Will, differs from the ſeveral Caſes that have been cited of Marriage Articles, in the Nature of which the Iſſue are particularly conſidered, and looked upon as Purchaſers; (*b*) and for which Reaſon, the Court has reſtrained the general Expreſſions made uſe of by the Parties; for it cannot reaſonably be ſuppoſed that a valuable Conſideration would be given for the Settlement of an Eſtate, which, as ſoon as ſettled, the Huſband might deſtroy. But no Caſe has been cited where, upon the Words of a Will, or the Parties claim voluntarily, the like Decree has been made. In all ſuch Caſes, the Teſtator's Intent muſt be preſumed to be conſiſtent with the Rules of Law; and at Law theſe Words would certainly create an Intail; neither can it be inferred (with any Certainty) from the Power of Leaſing given by the Teſtator, that no Eſtate-tail was intended; in regard ſuch Power of Leaſing is more beneficial than that given to Tenant in Tail by Statute. And as the Debts are admitted by the Pleadings to be all paid, the ſame Conſtruction is now to be made, as if there had been originally no Truſt. (*b*) Poſt 291, in *Seale* ver. *Seale.*

So decree *A.*'s Share or fourth Part to be conveyed to him and the Heirs Male of his Body, Remainder over, *&c.* that being thought more proper by the Plaintiff's Counſel than an Eſtate in Fee.

DE

Term. S. Trinitatis,

1711.

Caſe 39.

Sir Thomas Meers verſus *Lord Stourton*, *& è contra.*

A Peer of the Realm is to put in his Anſwer upon Honour, but his Anſwer to Interrogatories, and Examination as a Witneſs, muſt be on Oath.

SIR *Thomas Meers* brought a Bill *verſus* Lord *Stourton* to foreclose him; and Lord *Stourton* brought his Bill *verſus* Sir *Thomas Meers*, to compel him to a ſpecifick Performance of Articles for the Purchaſing of Lord *Stourton*'s Eſtate. Sir *Thomas* in his Defence inſiſted, that there were Defects in Lord *Stourton*'s Title to the Eſtate; and it being at length ordered that the Lord *Stourton* ſhould be examined on Interrogatories touching his ſaid Title, it was objected, that the Lord *Stourton* being a Peer of the Realm, ought to anſwer upon *Honour* only.

On the other Side it was anſwered, and ſo ruled by Lord Keeper *Harcourt*, that tho' the Privilege of Peerage did allow a Peer to put in his *Anſwer* upon *Honour only*, yet this was reſtrained to an *Anſwer*; and that as to all *Affidavits*, or where a Peer is examined as a Witneſs, he muſt be upon his Oath; and that this Examination upon Interrogatories, being in a Cauſe wherein his Lordſhip was Plaintiff to enforce the Execution of an Agreement; as his Lordſhip would have Equity, ſo he ſhould do Equity, and allow the other Side the Benefit of a Diſcovery, and *that in a legal Manner*: And ſo ordered, that the Lord *Stourton* ſhould put in his Examination upon Oath.

Katherine Copley an Infant verſus *Lyonel Copley.*

Caſe 40.

Lord Keeper Harcourt.

A Man has one Daughter to whom 8000 *l.* is ſecured by Marriage Settlement; and afterwards he gives her 8000 *l.* by his Will for her Portion, and 200 *l. per Annum.* The Daughter ſhall have but one 8000 *l.* tho' ſhe may elect which of the Portions ſhe pleaſes.

THE Plaintiff was the only Daughter and Heir of Sir *Godfrey Copley* her deceaſed Father, and Grandchild and Heir of *Godfrey Copley* her deceaſed Grandfather.

In 1654. *Godfrey Copley* the Grandfather ſettled his Eſtate upon himſelf for Life, Remainder to his firſt, *&c.* Son in Tail, with a Proviſo, that if his Son (afterwards Sir *Godfrey*) ſhould die without Iſſue Male and leaving a Daughter, the Truſtees ſhould raiſe out of Part of the Premiſſes 5000 *l.* to be paid to ſuch Daughter within a Year after her Marriage, or at her Age of twenty-one, which ſhould firſt happen; after which the ſaid *Godfrey Copley* died.

In 1681. Sir *Godfrey Copley*, purſuant to Articles on his Marriage, ſettled all the ſaid Eſtate (including the Premiſſes charged with the 5000 *l.*) on himſelf for Life, Remainder to his firſt, *&c.* Son in Tail Male, Remainder to Truſtees for 200 Years, in Truſt to raiſe 8000 *l.* for Daughters Portions, (if no Iſſue Male) payable at eighteen, if then married, or at any Time after, when married.

In 1709. Sir *Godfrey Copley*, having no Iſſue Male, by his Will deviſed all his Lands to his Kinſman *Lyonel Copley*, the Defendant, in Tail Male, chargeable with his Legacies, and deviſed to the Plaintiff his Daughter *Catherine for her Portion* 8000 l. (*viz.*) 4000 *l.* Part of it, to be paid her at her Age of eighteen Years, and 4000 *l.* the Reſidue of it, within a Year after Marriage, or, in all Events, at twenty-one; and deviſed to her 150 *l. per Annum* until eighteen, and afterwards 200 *l. per Annum* for her Life.

And now the Plaintiff *Catherine* brought her Bill for the Recovery of all theſe Sums of 5000 *l.* 8000 *l.* and 8000 *l.* inſiſting, that none of them being given in Satisfaction of the other, and it being the Caſe of an Heir at Law, and theſe Sums payable at different Times, ſome leſs beneficial than others; therefore, all theſe Portions, or at leaſt the 5000 *l.* given by the Grandfather, and the 8000 *l.* given by the Father, ſhould be paid to her.

Sed per Cur': The Will ſays, that the 8000 *l.* given thereby is for the Plaintiff's *Portion*, and this 8000 *l.* and the Annuity of 200 *l. per Annum* for her Life, ſeem the moſt beneficial; but it is a hard Demand in Equity, when only *one* Portion is intended the Plaintiff, that ſhe ſhould be ſuing for *three*. Wherefore, foraſmuch as the Plaintiff has no Remedy to recover any of her Portions, but by the Aid of a Court of Equity, ſhe ſhall not recover more than was intended her. But the Infant ſhall not by this Decree be precluded from electing the Portion by the Marriage Settlement, if ſhe, when ſhe comes of Age, thinks that more for her Advantage. However, ſhe ſhall not have two Portions inſtead of one.

Tomlinſon verſus *Dighton.* Writ of Error from a Judgment in *C. B.* on a ſpecial Verdict in Ejectment.

Caſe 41.

Argument for the Defendant.

THE Caſe in ſhort is but this:

John Tomlinſon ſeiſed in Fee of the Land in Queſtion, deviſes the Premiſſes to his Wife *Margaret* for her Life, and then to be at her Diſpoſal, provided it be to any of his Children, if living, if not, to any of his Kindred that his Wife ſhall pleaſe.

Salk. 239.

Deviſe to *A.* the Teſtator's Wife, for Life, and then to be at her Diſpoſal; provided it be to any of his Children, gives an Eſtate for Life, with a Power to diſpoſe of the Fee. And where ſuch Deviſee with an after taken Husband did by Leaſe and Releaſe, and Fine, convey the Premiſſes to a Truſtee and his Heirs, to the Uſe of the Wife for Life, without Impeachment of Waſte; Remainder to her Daughter by her firſt Husband, and the Heirs of her Body; Remainder to the Son by her firſt Husband, and his Heirs: This adjudged a good Execution of the Power.

The Teſtator dies leaving Iſſue *William* and *Heſter*; *Margaret* the Teſtator's Widow marries one *Simon Siſſon* her ſecond Huſband, and they two, by Indentures of Leaſe and Releaſe, reciting the Teſtator's Will, grant the Premiſſes in Queſtion to Truſtees and their Heirs, to the Uſe of *Margaret* herſelf for her Life, *ſans* Waſte; Remainder to the Uſe of *Heſter* the Teſtator's Daughter, and the Heirs of her Body; Remainder to the Uſe of *William* the Teſtator's Son and his Heirs.

In the Deed of Releaſe there is a Covenant, that this *Siſſon* and *Margaret* his Wife ſhould levy a Fine of the Premiſſes to the Uſes abovementioned, which Fine was accordingly levied.

And the only Queſtion is, whether this Leaſe and Releaſe, and Fine, paſs a good Eſtate to *Heſter* and the

Heirs of her Body, expectant upon her Mother's Death? if ſo, then ſhe being dead, *Robert Carliſle* the Heir of her Body, and Leſſor of the Plaintiff, has a good Title.

And I humbly take it, here is a good Eſtate conveyed to *Heſter* and the Heirs of her Body.

In this Caſe I ſhall only make two Points, *1ſt*, What Eſtate paſſes by this Will to *Margaret* the Teſtator's Wife, whether a Fee-ſimple, or only an Eſtate for Life, with a Power to diſpoſe of the Fee to any of her firſt Husband's Children, or Kindred?

Secondly, Admitting that *Margaret* has but an Eſtate for her Life by the Will, with a Power to diſpoſe of the Premiſſes to any of her firſt Husband's Children, *&c.* whether ſhe has well executed this Power, in reſpect of her being, at that Time, under Coverture with her ſecond Husband, and (which is the chief Queſtion) in reſpect of the improper Conveyance which ſhe has made uſe of for this Purpoſe.

And, with Submiſſion, I take it, that the declaring or limiting the Uſe by the Releaſe to *Heſter* and the Heirs of her Body, expectant upon her Mother's Death, is a good Appointment, and a good Execution of the Power.

As to the firſt Queſtion, I would beg Leave to put it as a ſhort Caſe:

A Man ſeiſed in Fee, deviſes his Lands to his Wife for her Life, and then to be at her Diſpoſal, provided ſhe diſpoſes of the Premiſſes to any of his Children;

The Queſtion is, what Eſtate the Wife has by the Will in this Caſe?

And

And I think it might be reaſonably inſiſted, that by this Deviſe of the Land to the Wife for her Life, *and then to be at her Diſpoſal*, ſhe has a Fee-ſimple.

And that the following Words [provided ſhe diſpoſes of the Premiſſes to any of the Teſtator's Children,] annex a Condition to this Fee, and make it a conditional Fee-ſimple, to be void, if the Wife does not diſpoſe of the Premiſſes to ſome or one of her firſt Husband's Children.

As to the former Words, if they were only thus, *I deviſe my Lands to my Wife, and to be at her Diſpoſal*, there could be no Queſtion, but this would be a Fee-ſimple.

A Deviſe of Lands to one, to give and to ſell, is a Fee-ſimple. 1 *Inſt.* 9. *b.* 1 *Roll. Abr.* 832. (7.) The Power of diſpoſing and the Power of ſelling, are the Badges of abſolute Ownerſhip; and therefore, where Lands are deviſed to any one with theſe Powers, the Deviſee has an abſolute Ownerſhip, and that is a Fee-ſimple.

It it true, that in this Caſe, if there were not a Deviſe of the Lands to the Wife, but only a Deviſe that the Wife might diſpoſe of the Land, this might give the Wife a Power only, and not an Intereſt; like a Deviſe that my Executors ſhall ſell my Land, this only gives a Power, and no Eſtate, to my Executors.

But if I deviſe my Land to my Executors to ſell, this paſſes an Eſtate to my Executors, and that Eſtate is a Fee-ſimple. 1 *Inſt.* 113. *a.* So in the principal Caſe, the Deviſe being of the Land it ſelf to the Wife, *and to be at her Diſpoſal*, theſe Words, if they went no farther, would paſs a Fee-ſimple to the Wife.

But it is very true, here are afterwards reſtraining Words in the Will, which ſay, *I give my Lands to my Wife for Life, and then to be at her Diſpoſal, provided ſhe diſpoſe of the Premiſſes to any of my Children*; which latter Words, as I take it, annex a Condition to this Fee, and ſubject it to a Forfeiture, if ſhe does not diſpoſe of the Premiſſes to ſome or one of her firſt Husband's Children.

I ſhall beg Leave to mention two Caſes, wherein are the like reſtrictive Words with the principal Caſe, and go a great Way in proving it to be a Fee-ſimple.

In *Daliſon* 58. (*Anonymus* Caſe,) A Man by his Will deviſes Land to his Wife, to diſpoſe and imploy it upon herſelf and her Son, at her Will and Pleaſure; and held by *Dyer* C. J. *Weſton* and *Walſh* Juſtices, that the Wife had a Fee-ſimple; but yet the Words [*to imploy the Premiſſes upon her ſelf and her Son,*] being in a Will, make the Fee-ſimple deviſed conditional only, ſo that if the Wife ſhould alien to a Stranger, it would be a Forfeiture.

So in the principal Caſe, where the Deviſe is of the Lands to the Wife *to be at her Diſpoſal*, provided ſhe diſpoſe of the ſame to any of his Children, *&c.* the former Words make a Fee-ſimple, and the latter Words reſtrain them to a conditional Fee, that the Wife ſhall not alien from the firſt Husband's Children, *&c.*

The other Caſe is the Caſe of *Daniel* and *Ubly*, reported 1 *Jones* 137. *Latch* 39, 134. *Noy* 80. *Bendl.* 178. Where a Man deviſes his Lands to his Wife to diſpoſe at her Will and Pleaſure, *and to give to ſuch of my Sons as ſhe thinks beſt*; and by *Crew* C. J. *Whitlock* and *Doderidge*, againſt *Jones* J. it is reſolved, the Wife had a Fee-ſimple in Point of Intereſt, and not a bare Power only to diſpoſe of the Fee-ſimple. Which Caſe comes very near our Caſe.

I muſt agree, there is this, and this only Difference, between the principal Caſe and theſe two which I have cited; *viz.* that in the principal Caſe now before the Court, the Will gives an expreſs Eſtate for Life to the Wife, and afterwards the Premiſſes are to be at her Diſpoſal.

But in the Caſes cited, no expreſs Eſtate for Life is given to the Deviſee, only a Deviſe of the Lands to the Wife in general, and ſhe to diſpoſe of them as ſhe ſhall think fit; how far this Difference may weigh with your Lordſhip, I ſubmit. If by the Deviſe of the Lands to the Wife to be at her Diſpoſal, a Fee-ſimple paſſes, (as is plain from theſe Authorities which I have cited,) then a Deviſe to the Wife to be at her Diſpoſal, is equivalent to a Deviſe to the Wife and her Heirs.

And if ſo, then I ſubmit to your Lordſhip, whether it is not the ſame, as if the Deviſe were to the Wife for her Life, Remainder to her and her Heirs, which would be a plain Fee-ſimple; and if it be a Fee-ſimple in the Wife, then ſhe and her ſecond Husband (*Siſſon*) afterwards joining in the Leaſe and Releaſe, and Fine, to the Truſtees, to the Uſe of herſelf for Life, with Remainder to the Uſe of her Husband's Daughter *Heſter*, and the Heirs of her Body, this paſſes a plain Eſtate-tail to *Heſter*.

And then the Wife and the Daughter *Heſter* being both dead, her Son *Robert Carliſle*, the Leſſor of the Plaintiff, has an undoubted Title.

But, my Lord, I muſt admit there are two Caſes that are expreſs Authorities that the Wife in the principal Caſe has but an Eſtate for Life, with a Power to diſpoſe of the Fee; and that theſe two Caſes do make this very Difference, *viz.* where Lands are deviſed to one generally, and to be at his Diſpoſal, this is a Fee in the Deviſee; but where Lands are deviſed to one expreſly for Life, and afterwards to be at the Deviſee's Diſpoſal, (which is the Caſe before your Lordſhip,) in this Caſe only an Eſtate for Life paſſes to the Deviſee, with a bare Power to diſpoſe of the Fee; for that (as it is ſaid) Words of Implication ſhall not merge or deſtroy an (*a*) expreſs Eſtate for Life.

(*a*) Vide ante 55, 78.

Theſe Caſes are one of them in 3 *Leo.* 71. (*Anonymus* Caſe) where *A.* ſeiſed in Fee deviſes his Lands to his Wife for Life, and after her Death ſhe to give the ſame to whom ſhe will, and ſhe by Deed grants the Reverſion to a Stranger in Fee; reſolved by the Judges, that the Wife had but an Eſtate for Life, with a Power to diſpoſe of the Reverſion in Fee; for an expreſs Eſtate for Life being given to the Wife, ſhe ſhall not, by Implication, have any further Eſtate, but only a Power to diſpoſe of the Fee; but if an expreſs Eſtate for Life, had not been given to the Wife, then the other Words, [to give to whom ſhe pleaſes,] would have veſted in her the Eſtate in Fee, and not a bare Power only.

The other Caſe is in 1 *Mod* 189. *Lieſe* verſus *Saltingſtone*, reported ſhortly in 2 *Lev.* 104. by the Name of Sir *Richard Saltonſtall*'s Caſe, and in *Carter* 232. Where one deviſed Lands to his Wife for Life, and that ſhe ſhould diſpoſe of them to ſuch of the Teſtator's Children as ſhe ſhould think fit; and by *Wyndam*, *Ellis* and *Atkins*, Juſtices, againſt *Vaughan* C. J. The Wife is adjudged to be Tenant for Life, with a Power to diſpoſe of the Fee to any of her Husband's Children. And here in 1 *Mod.* the ſame Difference is taken, *viz.* where an expreſs Eſtate for Life is deviſed to the Wife, there the ſubſequent Words will only give a Power, and not an Eſtate to merge and deſtroy the expreſs Limitation for Life. Indeed *C. J. Vaughan* is ſingular in his Opinion in this Caſe, by holding, that by theſe Words the Wife had a Power of diſpoſing of an Eſtate for Life only to the Children; but the other three Judges were againſt him, conceiving that a Power by Will to diſpoſe of Lands, or to ſell Lands, equally enables the Deviſee to paſs the Fee-ſimple; I ſhall therefore admit, upon the Foot of theſe two Authorities, that an expreſs Eſtate for Life being deviſed to the Wife, ſhe has not an Eſtate in Fee, but an Eſtate for Life only, and a bare Power to diſpoſe of the Fee.

And then, taking it that the Teſtator's Wife in this Caſe has but an Eſtate for her Life, with a Power only of diſpoſing of the Fee to any of her firſt Husband's Children, *&c.* The next Queſtion is, whether the Wife marrying again with *Simon Siſſon* her ſecond Husband, this, during her Coverture, does not ſuſpend her Power of diſpoſing of the Fee to any of her firſt Husband's Children?

And as to this Point, it ſeems very plain, that her ſubſequent Marriage is no Suſpenſion of her Power, becauſe, whenever ſhe executes the Power, by diſpoſing of the Premiſſes to any of her firſt Husband's Children, ſuch Child or Appointee, is not in under her, but by the Will of her firſt husband.

That this ſubſequent Marriage is no Suſpenſion of the Power, is expreſly Reſolved in the Caſe which I have mentioned of *Daniel* and *Ubley* in 1 *Jo.* 137. & *Noy* 80. And there we may ſee a ſtronger Caſe mentioned, which is, Lands are deviſed to a Woman, on Condition that ſhe ſhould convey to *J. S.* and ſhe afterwards marries; yet 'tis held that the Woman, even during her Coverture, may (to prevent the Breach of the Condition) make a Feoffment to *J. S.* tho' in that Caſe, the Eſtate and Intereſt paſſes from the Feme Covert; and there the Feme Covert's Feoffment is reſembled to the Caſe, where one grants an Eſtate-Tail to *A.* with Remainder to *B.* in Fee, on Condition that *A.* the Tenant in Tail ſhould grant a Rent in Fee to a third Perſon; and reſolved that the Tenant in Tail may grant this Rent, which when granted, ſhall bind both the Iſſue in Tail, and the Remainder-Man, becauſe it is to ſave the Eſtate from being forfeited; ſo to prevent the Breach of the Condition, a Feme Covert ſhall be enabled to make a Feoffment.

I ſhall only mention one Caſe more on this Head, and that is, one much ſtronger than the principal Caſe, and which is pretty often mentioned in the Books, 'tis in 1 *Roll*'s *Abr.* 329. *Pl.* 10. 10 *H.* 7. 20. & 1 *Inſt.* 112. *a.* One ſeized in Fee, deviſes that his Wife ſhall ſell his Land, and dies, and the Wife takes a ſecond Husband, and held, that the Wife's Power of ſelling, is not only ſubſiſting, notwithſtanding her ſecond Marriage, but that ſhe may ſell the Land even to her ſecond Husband.

So that this ſeems extreamly plain, that the Wife's ſecond Marriage does not hinder her from executing her Power.

And now I am come to what I take to be the principal Queſtion in the Caſe, and what (as I was informed) did chiefly ſtick with the Court, which is, whether theſe

Deeds of Leaſe and Releaſe did not amount to a good Execution of the Power?

And as to this, the Caſe is, The Teſtator's Widow is Tenant for Life, with a bare Power to diſpoſe of the Premiſſes to any of her firſt Huſband's Children, and the Wife with a ſecond Huſband grants the Premiſſes by Leaſe and Releaſe to the Uſe of herſelf for Life, remainder to the Uſe of *Heſter* her firſt Huſband's Daughter, and the Heirs of her Body.

Whether this be a good Execution of the Power, is the Queſtion?

The Objections againſt it have been, That this is a very improper Method of doing it, the Parties rather conveying an Eſtate as Owners, than executing a Power.

Alſo it was objected by Mr. *Lutwyche*, (who argued for the Plaintiff) that nothing by this Conveyance is intended to paſs, but what ariſes by way of Uſe out of the legal Eſtate conveyed to the Truſtees, which being (at moſt) but an Eſtate for the Life of the Teſtator's Wife, is not ſufficient to afford an Eſtate-Tail to *Heſter*.

But, with Submiſſion, I ſhall endeavour to prove, both from the Reaſon of the Law, and alſo from Authorities, (which as I conceive come fully up to this Point,) That this Indenture of Releaſe is a very good Appointment, and a very effectual Execution of the Power.

It is an eſtabliſhed Rule, That in the Caſe of Deeds as well as Wills, Regard is to be had to the Intent of the Parties, and that a Deed ſhall never be laid aſide as void, if by any Conſtruction it can be made good.

The Lord *Hobart* in his Reports (*fol.* 277.) takes Notice, with due Commendation to my Lords the Judges, that they are curious, and almoſt ſubtil, that they are *aſtuti* (as he terms it) to invent Reaſons and Means to help and aſſiſt the juſt Intent of the Parties.

And whereas it has been ſaid, that Powers are to be taken ſtrictly, The Execution of this Power ſhall be taken favourably, in regard, in Notion of Law, it is Part of the Teſtator's Will, and the Appointee is in under the Will, and therefore this Deed of Releaſe in this Caſe, is intitled to the ſame Favour, in the Conſtruction of it, as is due to the Will to which it refers.

Now in the principal Caſe, it cannot be doubted, but that it was the plain and full Intent of *Margaret Siſſon* the Teſtator's Wife, that after her Death, her Huſband's Daughter *Heſter*, by Virtue of this Deed of Releaſe, ſhould be intitled to the Premiſſes to her and the Heirs of her Body, this cannot be denied; and any Writing, expreſſing ſuch the Party's Intent, amounts in Law to a good Appointment, and to a good Execution of the Power.

'Tis true, where in an Execution of a Power the Party is confined to obſerve any particular Circumſtances, as that of Atteſting a Deed with ſuch and ſuch Witneſſes, *&c.* Thoſe Circumſtances (*a*) muſt be obſerved; but where the Party is left at Liberty in that reſpect, and not confined to any Particulars, but has (as in this Caſe) a Power in general to diſpoſe of the Premiſſes to any of her Huſband's Children: Any Writing ſigned by the Party, expreſſing the Party's Intent to diſpoſe of the Premiſſes to any of her Huſband's Children, is a good Appointment; and conſequently, this

(*a*) See the Caſe of *Bath* verſus *Montagu*, Chan. Reports in 8vo, 2 Part. 417.

this Deed of Releaſe plainly expreſſing an Intent, that after her Deceaſe, the Daughter *Heſter* ſhall have the Premiſſes in Tail, ſuch Writing is a good Appointment.

Suppoſe the Teſtator's Wife had, by this Deed of Releaſe, ſaid no more than declared, that the Premiſſes, after her Deceaſe, ſhould be to the Uſe of *Heſter* her firſt Huſband's Daughter and the Heirs of her Body, it could not have been doubted, but that this had been a good Appointment, and a good Execution of the Power. And 'tis as plain, that by this Deed of Releaſe, the Teſtator's Wife ſays *that*, tho' at the ſame Time ſhe ſays a great deal more. She does indeed, by many Words, grant the Premiſſes to Truſtees and their Heirs, but this is declared to be to the Uſe of herſelf for her Life, and afterwards to the Uſe of her Huſband's Daughter and the Heirs of her Body.

Now this Declaring of the Uſe is alone ſufficient, this Uſe is limited to the Party herſelf; and Surpluſage, even in Special Pleadings, nay even in Indictments, will not hurt, much leſs in a Conveyance.

So that rather than the Deed ſhall be wholly void, *ut res magis valeat quam pereat*, the ſeveral Clauſes of the Deed, except what declare the Uſe to *Heſter* after her Mother's Death, ſhall be rejected, and that Part ſhall ſtand and be a good Appointment, and the Clauſe limiting the Uſe to the Teſtator's Wife *ſans* waſte ſhall be void.

It has been objected, That by this Leaſe and Releaſe, it ſeems intended to be a Conveyance from the Parties rather as Owners, than by Virtue of a Power, and the rather, for that in this Caſe the Parties have ſome Ownerſhip, I mean, an Eſtate for Life in *Margaret Siſſon* the Teſtator's Wife, which her Huſband and ſhe are capable of granting over, and that may be objected as ſufficient to ſatisfy the Grant.

Now 'tis true, that where a Man is Owner of an Eſtate, and is alſo enabled by Virtue of a Power to diſpoſe of this Eſtate, and this Man does grant or deviſe ſuch Eſtate generally, this ſhall operate, upon his Right of Ownerſhip, and not by Virtue of his Power, as in 6 *Co.* 18. *a.* Sir *Edward Cleere*'s Caſe. Where a Man makes a Feoffment of his Land to ſuch Uſes, and for ſuch Eſtates, as he ſhall by his Will appoint, the Feoffor ſtill continues Owner of this Land, and if the Feoffor makes his Will, and, inſtead of limiting the Uſes of this Feoffment, does deviſe the Land generally, the Land, in this Caſe, paſſes from the Teſtator as Owner, and not by Virtue of the Power.

But 'tis as true, and proved by the ſame Authority, That where One as Owner of Land is *not* able to grant the Eſtate mentioned to be conveyed, but by Virtue of the Power he *is* able to grant it, the Grant in this Caſe, ſhall take Effect by Virtue of the Power, and ſhall not operate upon the Ownerſhip.

Therefore in our Caſe, ſince the Teſtator's Wiſe *Margaret could not*, as Owner, paſs the Eſtate-Tail to *Heſter* to commence from and after her own Deceaſe, nor indeed had any Ownerſhip for the ſupplying of that Grant, it being to commence after her Death, at which Time her Eſtate or Intereſt (being for her Life) determines; and ſince *Margaret* the Teſtator's Wiſe *could* by Virtue of her Power, grant this Eſtate to *Heſter*; therefore the Grant of this Eſtate-Tail ſhall take Effect from her Power, and not from any Pretence of Ownerſhip.

It is ſettled in this Caſe of Sir *Edward Cleere*, and in *Scroope*'s Caſe in 10 *Co.* 143. *b.* That tho' there be no Recital of the Power, yet if the Grant cannot take it's

Effect without the Power, the Grant ſhall operate upon the Power.

Much rather ſhall it be ſo in this Caſe, where the very Power, and the Will that gave it, are both recited in the Deed of Releaſe, and where the Recital of the Power, is a plain Demonſtration, that this Power was thought of, and in View, when the Deed was prepared, and that the only Deſign and End of this Deed (tho' drawn by an unſkilful Hand) was to execute ſuch Power.

'Tis alſo objected, that in the Leaſe and Releaſe in the principal Caſe, made by the Teſtator's Wife *Margaret* and her ſecond Huſband, to Truſtees and their Heirs to the Uſe of herſelf for Life, with Remainder to *Heſter* the Teſtator's Daughter in Tail, theſe Uſes are intended to ariſe out of the Eſtate of the Truſtees, and if there be not a ſufficient Eſtate conveyed to the Truſtees for that Purpoſe, no uſe can ariſe.

Now as to this Objection, 'tis true, that if the Conveyance operates by Virtue of the Leaſe and Releaſe, the Uſes in ſuch Caſe muſt ariſe out of the Truſtees Eſtate; but if the Deed of Releaſe operates as an Appointment (as I apprehend it does) then the Appointee is in under the Will, and does no way derive his Intereſt from the Eſtate of the Truſtees in the Releaſe.

And 'tis no Objection, that the Grantor intended that this Conveyance ſhould operate by way of Leaſe and Releaſe, and not by Virtue of the Power as an Appointment.

For the chief and primary Intent of the Grantor, was, that the Eſtate ſhould paſs to *Heſter* the *Ceſtuy que Uſe* of this Deed of Releaſe, and the Court ſhall have more Regard to this, than to the Manner of paſſing, which is of leſs Moment, and left (it may be) to the Contrivance of ſome ignorant Scrivener.

It is plain the chief Intent of the Parties is to paſs the Eſtate. Conſequently,

The Method, by which 'tis intended to paſs, ought to be only ſubſervient to the chief Intent.

And for this Purpoſe in 3 *Lev.* 372. in the Caſe of *Oſman* verſus *Sheafe*, Mr. Juſtice *Rookeby* cites the Caſe of *Saunders* and *Savile*, cited alſo in 2 *Lev.* 213. and mentioned to be adjudged in *Com. Banc. Hil. Anno* 1655. *Rot.* 1578. Where a Man ſeiſed in Fee of a Rent, does by Deed grant it to one that was his Kinſman, and there is an Attornment to the Grant, but the Attornment was made by one that was not a real Tenant of the Land, and therefore void. Here, though the Intent appeared, that the Deed ſhould operate as a Grant at Common Law with an Attornment, yet ſince it could not paſs that Way, it was adjudged that the Grant being made to a Relation, ſhould operate as a Covenant to ſtand ſeiſed. And many other Caſes much of the ſame Nature with this are there cited;

As where a Man by Deed does give and grant Lands to another, and a Letter of Attorney to make Livery is indorſed upon the Deed, but no Livery happens to be made; yet if this Grant be made to a Relation, it ſhall operate as a Covenant to ſtand ſeiſed, though the Letter of Attorney indorſed on the Deed for the making of Livery, ſhews the plain Intent of the Deed, and of the Parties thereto, to have been, that the Land ſhould paſs in another Manner, that is, by Feoffment and Livery.

So though a general Warranty be contained in a Deed whereby Lands are granted to a Man and his Heirs, with a general Warranty againſt all Perſons whatſoever, and no Livery, or a void Livery is made; yet if this Grant alſo be made to a Relation, it ſhall operate as a Covenant to ſtand ſeiſed, though the Inſerting the Warranty ſhews the Intent to have been, that the Lands ſhould paſs by Way of Feoffment, in which Caſe, the Feoffee, if impleaded, might vouch upon the Warranty; whereas it operating by Way of Uſe, and a Covenant to ſtand ſeiſed, the Grantee is in the *Poſt*, and cannot vouch.

Upon all which Caſes, Mr. Serjeant *Levinz* makes an Obſervation very appoſite to the preſent Caſe: "That "the Judges, of late Times, have had a greater Con"ſideration for the *paſſing* of the Eſtate which is the "*Subſtance* of the Deed, than the *Manner how* which is "the *Shadow*."

All theſe Caſes are very pertinent to the Matter now in Queſtion; and demonſtrate, that though in the preſent Caſe, it might be the Intent of the Conveyance, that the Premiſſes ſhould paſs by Way of Leaſe and Releaſe, yet if they cannot paſs that Way (as they really cannot) but may paſs by Virtue of the Power, and as an Appointment, (as they really may) they ſhall paſs by Virtue of the Power, and as an Appointment, rather than the Deed ſhall be void.

If a Deed, plainly intended to operate as a Feoffment with Livery, rather than be void, ſhall operate as a Covenant to ſtand ſeiſed:

If a Deed, plainly deſigned to operate as a Grant with an Attornment, rather than be void, ſhall operate as a Covenant to ſtand ſeiſed:

Why ſhall not, in the principal Caſe, an Indenture of Releaſe, rather than be void, operate as an Appointment?

In Mr. *J. Jones*'s Reports 392. *Snape* verſus *Turton*, the Caſe was, *J. S.* was ſeiſed in Fee of Lands and covenanted by Indenture to levy a Fine of the ſaid Lands to the Uſe of himſelf for his Life, with Remainder to the Uſe of his Sons ſucceſſively in Tail Male, Remainder to the Uſe of the then Lord *Leiceſter* in Tail, Remainder to the Uſe of the Queen in Fee; and in this Indenture there was a Proviſo, that if *J. S.* who made this Settlement, ſhould grant or bargain and ſell his Lands to any other Perſon, or to any other Uſes, that then it ſhould be to thoſe Uſes.

J. S. who made this Settlement, and reſerved to himſelf an Eſtate for his Life, leaſed the Premiſſes for a Year to *A.* and afterwards by Deed reciting the Power, bargained and ſold, and granted the Reverſion to another and his Heirs, to which the Leſſee for Years attorn'd.

Here, tho' there was an Attornment to this Grant, which ſhew'd plainly the Intention of the Party to paſs this Reverſion as a Common-Law Conveyance, by Way of Grant and Attornment; And though in this Caſe the Grantor had an Eſtate for Life, which might have paſſed by this Grant, taking it as a Grant with an Attornment, and would have paſſed a deſcendible Freehold, and ſo might in ſome Meaſure have ſatisfied the Grant: (Whereas in our Caſe the Grantors, *Margaret* the Teſtator's Wife, and her ſecond Huſband *Siſſon*, had no Eſtate at all in them to ſatisfy the Grant to *Heſter* the

Teſtator's Daughter, that being of an Uſe to commence after the Mother's Death, and ſhe herſelf had but an Eſtate for her Life.)

Yet in this Caſe in *Jones* it is adjudged, that the Grant, notwithſtanding the Attornment, which ſhews it was intended to be a Common-Law Conveyance, ſhould however operate upon the Power, and be a good Declaration of new Uſes purſuant to the Power.

Now, this Caſe comes fully up to our Caſe, and differs only in being ſtronger; the Power, in both Caſes, is accompanied with an Eſtate for Life; and the Grant with an Attornment, is as improper a Way to execute the Power, in the Caſe cited, as the Leaſe and Releaſe is, to execute the Power, in the principal Caſe; and that Caſe ſeems ſtronger than the principal Caſe in this, as well as in the other Reſpects which I have mentioned, in regard, by this Conſtruction of the Grant, (tho' with Attornment, to operate as an Execution of the Power,) the Remainder in Fee limited to the Crown, of whoſe Revenues the Law in all Caſes is particularly careful, is deveſted and barr'd.

There was the Caſe of *Dyer* verſus *Awſiter* in 1706. in this very Point, which, tho' it was the Opinion of one Judge only, and at *Niſi prius*, yet it being before that great Man your Lordſhip's immediate Predeceſſor, I take it to be a conſiderable Authority.

In that Caſe, a Man had a Power to appoint and ſettle a Jointure on his Wife; and he made a Jointure on his Wife by Way of Leaſe and Releaſe, to the Uſe of his Wife for her Life, for her Jointure; which is directly our Caſe.

And C. J. *Holt* declared his Opinion, that it was a good Jointure; and the rather, becauſe the Word [ſettle] was a general Word as to the Manner of making the Jointure. Now, in the principal Caſe, we have as general a Word; in our Power it is, that the Teſtator's Wife might *diſpoſe*. The Word [diſpoſe] is as general a Word as the Word [ſettle]; and if in that Caſe, a Leaſe and Releaſe was a good Appointment of a Jointure, then ſurely in the principal Caſe, the Leaſe and Releaſe muſt alſo be a good Appointment, and a good Execution of the Power.

It is true, in that Caſe before C. J. *Holt* the Counſel preſſed for a ſpecial Verdict, and had it; but were ſo far diſcouraged by his Lordſhip's Opinion, that (as I underſtand) it was never argued, but the Jointure continues to be enjoyed to this Day under that informal Appointment that now occurs in the principal Caſe.

There are many more Caſes which I could cite on this Head,

But I ſhall trouble your Lordſhip with only two more; the firſt is that of *Stapleton* cited by C. J. *Hale* in 1 *Vent*. 228. in the Caſe of *King* and *Melling*, and cited again by C. J. *Hale* in *Raym. Rep*. 239. by the Name of Lady *Haſtings*'s Caſe; which I take to be full in Point.

The Caſe was, *A*. Tenant for Life with a Power to make a Jointure, Remainder to *B*. in Fee, *A*. covenants with a third Perſon to ſtand ſeiſed to the Uſe of his Wife for her Life, for her Jointure; and adjudged a good Execution of the Power. And the Reaſon given in that Caſe is extreamly applicable to ours, *viz. Quando non valet quod ago, ut ago, valeat quantum valere poteſt.*

Now the Judgment in this laſt Caſe is liable to all thoſe Objections that can be made to me in the principal Caſe. For Inſtance, it is objected to me in the principal Caſe, that the Conveyance is intended to take Effect by way of Leaſe and Releaſe, and not by Virtue of the Power; why in that Caſe cited by C. J. *Hale*, the Intention appears as fully, that the Jointure ſhould take Effect by Way of Covenant to ſtand ſeiſed, and not by Way of a Power.

Again it is objected, in the principal Caſe, that it is intended the Uſe ſhould ariſe out of the Eſtate conveyed by the Leaſe and Releaſe to the Truſtees, which is not ſufficient for that Purpoſe.

The ſame Objection recurs in the Caſe cited by C. J. *Hale*; for there the Uſe is expreſly declared to ariſe out of the Eſtate of the Tenant for Life; He covenants to ſtand ſeiſed, and out of his Seiſin the Uſe is to ariſe, and yet it is a good Appointment of the Jointure.

It is true, that Caſe alſo differs in being ſtronger than the principal Caſe; for in that Caſe, there is no Recital of the Power, as there is in this:

And as in that Caſe it was adjudged a good Execution of the Power, ſo (I hope) it ſhall be in this.

Alſo in that Caſe the Court, in their Reſolution, rejected the greateſt Part of the Deed, and regarded that Part only that declared the Uſe;

And ſo (I hope) the Court will do here, rather than the Deed ſhall be taken to be wholly void.

As to the Fine, levied by the Teſtator's Wife and her ſecond Huſband, it being after the Leaſe and Releaſe, the ſame cannot affect this Caſe; in regard, before the levying the Fine, the Power is well executed by the Deed of Releaſe, that amounting to a good Appointment, and the Eſtate is veſted in *Heſter*, and ſo the Fine comes too late to do any Hurt.

Tho' I take it very plainly, that ſuppoſing there had been nothing in the Indenture of Releaſe, but a Covenant to levy a Fine to the Uſe of the Wife for Life, with Remainder to the Uſe of *Heſter* the firſt Huſband's Daughter in Tail, (as there is this Covenant in the Deed) I ſay, if there had been nothing elſe in the Deed, and a Fine had been levied accordingly, (as there has been in the principal Caſe,) this had been a good Execution of the Power, according to the Caſe of *Herring* and *Brown* in 1 *Vent.* 368, 371. Where the Caſe was, One makes a Settlement to the Uſe of himſelf for Life, with divers Remainders over to ſeveral Perſons *in eſſe*, with Power to revoke under his Hand and Seal atteſted by two or more credible Witneſſes; the Tenant for Life levies a Fine of the Premiſſes, and by Deed ſubſequent declares the Uſe of this Fine.

And in this Caſe, it was all along admitted, that if the Deed declaring the Uſe of the Fine had been precedent to the Fine, (as it is in the principal Caſe,) it had been a good Execution of the Power, and a good Revocation.

I admit, in the Caſe of *Herring* and *Brown*, the Deed being ſubſequent to the Fine, it was adjudged in this Court, that the Fine was an Extinguiſhment of the Power; but in Error brought of this Judgment in the Exchequer Chamber, the ſame was reverſed; and reſolved, that the Fine and Deed (tho' ſubſequent) were but as one Conveyance, and therefore were a good Execution of the Power, a good Revocation of the former Uſes, and a good Declaration of new ones.

The other Caſe is that of *Wigſon* and *Garrit*, 2 *Lev.* 149. where *J. S.* makes a Settlement with a Power to revoke the Uſes therein, and limit new Uſes by Indenture ſealed in the Preſence of three Witneſſes. *J. S.* covenants by Indenture ſealed in the Preſence of three Witneſſes to levy a Fine to other Uſes, and levies a Fine accordingly: Whereupon it was adjudged by C. J. *Hale & Cur'*, that this was a good Execution of the Power, and a good Revocation; for tho' the Deed of Covenant to levy the Fine, would not, alone, make any Revocation, for that it was not itſelf any Conveyance, nor paſſed any Uſe; and tho' the Fine alone would make no Revocation, that not being an Indenture ſealed in the Preſence of three Witneſſes, yet both jointly made one Conveyance, and amounted to a good Revocation.

So here the Teſtator's Wife being Tenant for Life, with a Power to diſpoſe of the Premiſſes to any of her Husband's Children, if ſhe had done no more than covenanted to levy a Fine to the Uſe of herſelf for Life, Remainder to the Uſe of *Heſter* (one of the Husband's Children in Tail, and had levied a Fine accordingly, (all which ſhe has done) ſuch Covenant and Fine would be as one Conveyance, and this alone had been a good Appointment, and a good Execution of the Power.

Obj. The Appointment ought to be of a Fee-ſimple, whereas ſhe has appointed an Eſtate-tail.

Reſp. The Power to diſpoſe of a Fee-ſimple includes in it a Power to diſpoſe of any leſſer Eſtates.

Obj. This Diſpoſition by *Margaret* ſhould be by Will, and not by Deed, the Deviſe being to her for Life, and *then* to be at her Diſpoſal.

Reſp. The Word [Then] ſignifies only when this Appointment was to take Effect in Poſſeſſion, (*viz.*) after the Wife's Death. In the Caſe in 3 *Leon.* 71. where the Deviſe was to the Wife for her Life, and *after her Death* ſhe to diſpoſe as ſhe pleaſed, &c. the Words might well be intended of a Will, and therefore that Caſe was more liable to this Objection; yet it was adjudged ſhe might grant away the Reverſion in her Life-time. And in 3 *Co. Boraſton's* Caſe, 'tis adjudged, that the Adverbs [When] and [Then] in Caſe of Limitation of Eſtates, do not make any Thing neceſſary to precede the Settling of them, any more, than where one lets Lands for Life, and after Leſſee's Deceaſe, *then* the Remainder to *J. S.* this Remainder will veſt preſently.

Obj. The Leaſe for a Year, made by *Margaret* and her ſecond Husband, is a Suſpenſion of the Power.

Reſp. 'Tis not; the Leaſe and Releaſe being but as one Conveyance, and ſo in Pleading (which is much more ſtrict) a Leaſe and Releaſe will amount to a Feoffment, and is taken Notice of by the Court as a common Aſſurance: Beſides, the Power ſeems collateral, and not appendant to the Eſtate, and ſo not extinguiſhable, tho' by a Feoffment. Thus in Caſe of a Power to Executors to ſell, a Feoffment made by them of the Premiſſes, will not extinguiſh their Power, but they may afterwards ſell notwithſtanding. 1 *Co.* 111.

Or if it be a Power appendant to the Freehold, as long as *that* remains, the Power remains alſo; and therefore, the leaſing for a Year will no more ſuſpend the Power, than a Leaſe for a Year made by one Jointenant will ſever the Jointenancy: And in the Caſe of *Snape* & *Turton*, in Mr. *J. Jones's Reports* 392. 'tis expreſly adjudged, that Leaſing for a Year did not ſuſpend the Power of Revocation, as to the Reverſion and Inheritance.

Upon the Whole: If it appears to be the plain Intent of the Parties, that the Eſtate ſhould paſs to *Heſter* in Tail, expectant on her Mother's Death, (as moſt evidently it does:) If any Words in Writing expreſſing the Intent, will amount to a good Execution of the Power, (as ſurely they will:) If theſe Words in this Releaſe be allowed ſufficiently to expreſs that Intent, (as plainly they do;) then, upon the Authorities I have mentioned, which, (as I take it) come fully up to the Point, this declaring of the Uſe to *Heſter* by this Releaſe in the principal Caſe, is a good Appointment to *Heſter*, and a good Execution of the Power; and had there been only a Covenant in the Deed of Releaſe for the levying of a Fine to theſe Uſes, (tho' I have no Manner of Occaſion for this Point,) yet ſuch Covenant, and the Fine afterwards levied, would have been a good Appointment to *Heſter*.

And therefore I pray, that the Judgment given by my Lords the Judges in the Common Pleas may be affirmed.

Parker C. J. With Reſpect to the firſt Queſtion, *viz.* What Eſtate paſſes by the Will to *Margaret* the Teſtator's Wife; We are all of Opinion, ſhe has but an Eſtate for Life, with a Power of diſpoſing of the Inheritance. And as to this, the Difference is, where a Power is given with a particular Deſcription and Limitation of the Eſtate, (as here,) and where generally, as to Executors to give or ſell; for in the former Caſe, the Eſtate limited being expreſs and certain, the Power is a diſtinct Gift, and comes in by Way of Addition; but in the latter, the whole is general, and indefinite; and as the Perſons intruſted are to convey a Fee, they muſt, conſequently, and by a neceſſary Conſtruction, be ſuppoſed to have a Fee themſelves.

With regard to the other Queſtion, (*viz.*) The Execution of the Power, it is clearly our Opinion, that this Conveyance by Way of Leaſe and Releaſe is an effectual, tho' improper, Execution of the Power.

Wherefore the Judgment in *C. B.* muſt be affirmed.

DE
Term. S. Michaelis,
1711.

Caſe 42.
Lord Keeper Harcourt.
Precedents in Chan. 400.
Money articled to be laid out in Land is to be taken as Land, even as to collateral Heirs.

Lingen verſus *Sowray*.

BY Articles before Marriage, the Husband agreed to add 700 *l.* to the Wife's Portion of 700 *l.* and the Securities for theſe Monies were aſſigned to Truſtees, and agreed to be inveſted in Land to be ſettled on the Husband for Life, Remainder to the Wife for Life, Remainder to the firſt, *&c.* Son in Tail Male, Remainder to the Daughters in Tail, Remainder to the right Heirs of the Husband.

The Marriage afterwards takes Effect, and there being no Iſſue thereby,

The Husband by Will deviſes ſome Lands to the Wife; *the reſt of his real Eſtate in the County and City of* York *and elſewhere in* Great Britain, he deviſes to *J. S.* alſo he gives his perſonal Eſtate, *and all his Securities for Monies, to his Wife,* whom he makes Executrix, and dies, leaving many of the Securities *remaining unaltered*; but ſome of the Money had been put out upon *other Securities,* and was mentioned to be in Truſt for the *Husband, his Executors and Adminiſtrators.*

And the Queſtion was, whether theſe Securities, or any of them, paſſed as perſonal Eſtate to the Wife?

It was objected, that tho' Equity would inforce an Execution of Agreements, yet the End and Scope of theſe Articles were determined, ſave only as to the Wife's Life, (*viz.*) the Huſband was dead, and there was no Iſſue of the Marriage, and the Conſideration, or Inducement to this Settlement looked no further, nor had any more extenſive Views; that it could not be the Deſign of the Settlement to take Care of, or provide for, diſtant or remote Heirs.

And that if this Money had been laid out in a Settlement, yet ſtill it had been in the Power of the Huſband to deviſe the Land purchaſed therewith; for it would have been a veſted Remainder in Fee in himſelf, and conſequently abſolutely at his Diſpoſal.

The only Queſtion then was, whether he intended to deviſe it?

Now it was more probable that he intended to paſs it under the Denomination of *Perſonal* than *Real* Eſtate; for that, in Fact, thoſe Securities were perſonal Eſtate, and muſt continue ſo, till actually inveſted in Land; and by the Deviſe of all his real Eſtate in the City or County of *York*, or elſewhere in this Kingdom, he muſt have alluded to *Land*, and Something *local*.

That it was not to be preſumed the Teſtator, who was a Layman, took it, that the Covenant altered the Nature of the Eſtate, and made that real, which before was, and in Fact afterwards continued to be, perſonal Eſtate; and in Caſe of Wills, the Intent of the Teſtator was the chief Thing to be regarded, and inquired after, and ſurely, when the Teſtator bequeathed all his perſonal Eſtate, nay, when he expreſly deviſed all his *Securities*, theſe Securities in Queſtion muſt be intended to paſs; or if this ſhould not be admitted in the Latitude that was contended for, at leaſt it would hold as to ſuch of the Securities, as had been altered, and taken, tho' in the Names of the ſame Truſtees, yet upon *different Truſts*.

Mr. *Vernon contra*, inſiſted that Equity, which inforced the Execution of Agreements, looked upon Money agreed to be inveſted in Land, as Land; and on the other Hand, conſidered Land agreed to be ſold, as Money; and therefore if a Man ſhould article for the Purchaſe of the Manor of *D.* which was an Eſtate in Fee, for 5000 *l.* and die, tho' the 5000 *l.* till inveſted, would go to the Executors, yet Equity would inforce an Execution of the Articles, and then it ſhould go to the Heir; ſo if one ſeiſed of Land in Fee ſhould agree to ſell it, and ſhould die before Sale, till ſold, it would be in Fact a real Eſtate, and as ſuch, deſcend to the Heir, but Equity would inforce a Sale according to the Agreement, by which it would become Money, and go to the Executor.

But there was ſtill more Reaſon why Money agreed to be inveſted in Land ſhould be taken as a real Eſtate, in regard this was for the Benefit of the Heir, who was (*a*) favoured in Equity, beyond an Executor or Adminiſtrator.

(*a*) Vide poſt *Hayter* verſus *Rod*, 364.

To which Purpoſe he cited the Caſe of (*b*) *Whitwick* ver. *Jermyn*, at which Lord C. J. *Hale* aſſiſted, and the Caſe of (*c*) *Kettleby* ver. *Atwood*, where upon Articles to lay out Money in a Purchaſe, and the Party dying before the Execution of ſuch Articles, the Diſpute was between the Heir and Executor, and decreed for the Heir; he

(*b*) 1 Vern. 471.

(*c*) 2 Vern. 298.

he alſo cited Sir *Jonathan Atkins*'s Caſe (*a*), as a ſtrong Caſe in Equity, in Lord Chancellor *Jefferys*'s Time, where upon Marriage-Articles it was agreed, that 1500 *l.* of the Husband's Money, and 1500 *l.* of the Wife's Money, ſhould be laid out in a Purchaſe of Land, and ſettled upon the Husband for Life, Remainder to the Wife for Life, Remainder to the Iſſue of the Marriage, but was ſilent where it ſhould go *afterwards, in Default of Iſſue*, and the Husband and Wife dying without Iſſue, the Queſtion was, whether the Executor of the Husband or the Executor of the Wife, or the Heir of the Husband or the Heir of the Wife, ſhould have the Benefit of the Articles?

(*a*) 2 Vern. 10.

And decreed, that the Articles making this Money as Land, it ſhould be taken to be real Eſtate, and ſhould go to the Heirs of the Husband, and not to the Heirs of the Wife; in regard that in the common Way and Uſage of Conveyances and Settlements, the Remainder in Fee was, in ſuch Caſe, limited to the Heirs of the Husband.

[*Sed Quære*, If the Money was to be taken as Land, it had not been reaſonable in this laſt Caſe to let one Half, (*viz.*) the Wife's 1500 *l.* or the Land therewith to be purchaſed, go to the Heir of the Wife, and the other 1500 *l.* or the Land therewith to be purchaſed, go to the Heir of the Husband?]

That this Caſe of *Atkins*'s was much ſtronger than the principal Caſe: For in that, the Uſes in the Articles were all determined by the Death of the Husband and Wife without Iſſue; and yet, when all the Ends of the Marriage-Articles were anſwered, and at an End, it was decreed to be as Land, and as real Eſtate; whereas in the principal Caſe, the Wife being living, all the Uſes of the Marriage-Articles were not determined;

mined; for the Wiſe by the Articles was to have the Benefit of them for her Life, *viz.* to have the Profits of the Lands to be purchaſed for her Life; and it was ſaid, Equity had gone further, by directing, where Money had been decreed to be laid out in the Purchaſe of Lands in Fee, that (*a*) the Wiſe ſhould have Dower.

(*a*) See 2 Vern. 536. *Sweetapple* verſus *Bindon*, where the Husband, under ſuch Circumſtances, was allowed to be Tenant by the Curteſy; & ante 110.

Lord Keeper: The Articles have, in Equity, changed the Nature of this Money, and turned it, as it were, into Land; and therefore, as to ſo much of the 1400 *l.* as is ſubſiſting upon the Securities on which it was originally placed, or on any other Securities, where no new Truſts have been declared, it ought to be conſidered as real Eſtate; but as to the 250 *l.* of it which was called in by the Teſtator, and afterwards placed out on Securities on a different Truſt, that ſhall be taken to be perſonal Eſtate; foraſmuch as there being no Iſſue of the Marriage, it was in the Power of the Husband to alter, and diſpoſe of it, as againſt the Heir at Law, though not againſt his Wife; and this Placing it out upon different Truſts I take to be an Alteration of the Nature of it, ſince the Teſtator's Declaring the Truſt to his *Executors*, ſeems *tantamount* with his having declared that it ſhould not go to his *Heir*.

On an Appeal before Lord *Cowper* (*Term' Paſchæ* 1715) this Decree was affirmed.

Lord Rockingham & al' verſus **Dr.** *Penrice & al'*.

Salk. 578.
Caſe 43.
Sir John Trevor, *Maſter of the Rolls.*

SIR *James Oxenden* before Marriage, and in Conſideration of 10000 *l.* Portion, ſettled an Eſtate upon his Lady (the Plaintiff the Lord *Rockingham*'s Siſter) for her Life for her Jointure, with a Power for himſelf to make Leaſes at the uſual Rent.

Leſſor dies on *Michaelmas* Day, and before Sun-ſet. The Heir or Jointreſs, and not the Executor, ſhall have the Rent. *Q.* If the Leſſor had died after Sun-ſet though before Midnight? If the Tenant had paid the Rent on the Day, the Payment had been good though the Leſſor had died before Sun-ſet; but his Executors to account for this to the Jointreſs, *&c.* *Q.*

Accordingly Sir *James* made Leaſes purſuant to the Power, of ſeveral Parts of the Land compriſed in this Settlement, reſerving the Rent at *Lady-Day* and *Michaelmas*, and died upon *Michaelmas* Day between three and four in the Afternoon and before Sun-ſet. And one of theſe ſeveral Leſſees, to whom the Leaſes were made, paid his Rent (being 18 *l.*) unto Sir *James Oxenden* in the Morning of the ſaid *Michaelmas* Day; but the other Tenants had not paid their Rent, the Arrears whereof came to about 500 *l.*

Hereupon the ſole Queſtion was, Whether theſe Arrears did belong to the Defendants, the Executors of Sir *James Oxenden* the Leſſor, or to the Jointreſs?

For the former it was inſiſted, that when *Michaelmas* Day came, the Rent was due on that Day, and therefore, according to *Clun*'s Caſe, 10 *Co.* 127. *b.* If on *Michaelmas* Day, being the Rent Day, the Tenant pays the Rent in the Morning to the Leſſor, who dies before Noon, this Payment, though Voluntary, is a good Payment againſt All but the King; ſo that it is not material that the Payment was not Compulſive, or that there was no Remedy for it by Debt or Diſtreſs; in regard it appears by that Book, that the Payment, though voluntary, is notwithſtanding good againſt the Heir. And the Caſe in 1 *Saunders* 287. of *Baskerville* verſus *Mayo*, was by the Counſel denied to be Law, where it is ſaid to be the Opinion of *Hale* C. J. that if one leaſes for Years, rendring Rent, and dies on the Rent Day after Sun-ſet and before Midnight, this Rent ſhall go to the Heir, and not to the Executor, for that (as it is there ſaid) though a convenient Time before Sun-ſet is the proper Time to demand the Rent, yet it is not due until "the End of the Day, *videlicet*, twelve "of the Clock at Night," which they objected was not Law; ſince at furtheſt, the Rent was due from the Tenant to the Leſſor at Sun-ſet; for a Convenient Time before Sun-ſet, for the telling the Money, was the Time for the Landlord to demand his Rent; upon Non-payment of which, the Leaſe might be avoided.

But it would be abſurd to ſay, the Leſſee ſhould forfeit the Leaſe for Non-payment of the Rent, before it was due; and a Caſe was cited betwixt * *Bellaſis* and *Cole*, at the Aſſizes at *Durham* before Mr. Juſtice *Tracy*, where

---

* *The following Note was communicated to me by Mr. Juſtice* Tracy.

Southern verſus *Bellaſis*. In Ejectment. This was made a Caſe upon a Trial before Judge *Tracy*, 19 *Apr.* 13 *W.* 3. By Deed and Fine a Term of 500 Years of the Tenements in Queſtion is created to the Leſſors of the Plaintiff for ſecuring an Annuity of 500 *l. per Annum*, and all Arrears thereof, payable to Sir *Ralph Cole* during his Life, and after his Deceaſe for ſecuring an Annuity of 200 *l. per Ann.* and all Arrears thereof, payable to the Lady *Cole* for her Life, granted *prout* the Deed, in ſuch Manner, and with ſuch Remedies *prout* the Deed. Sir *Ralph Cole* died, and all the Arrears of Rent due in his Life-time were paid, and the Lady *Cole* ſurvived him. Afterwards the Lady *Cole* died, *viz.* on *Michaelmas* Day 1704, at nine of the Clock at Night, being the firſt Day of Payment after Sir *Ralph Cole*'s Death, and the Plaintiff is her Adminiſtrator. The Sole Queſtion is, whether the Term be void without Payment of this Quarter's Rent, or whether this Quarter's Rent remains where one granted a Rent-Charge for Life, payable at *Lady-Day* and *Michaelmas*; the Grantee died on *Michaelmas* Day after Sun-ſet; and the Queſtion was, Whether the Executor of the Grantee ſhould have the Rent? And for that the Grantee lived until after Sun-ſet, which was the legal Time for demanding the Rent, though he died before twelve of the Clock at Night, yet it was held by that Judge, that this Rent ſhould go to the Executor. Beſides, it was obſerved, that according to the other Conſtruction, if the Jointreſs, in the preſent Caſe, ſhould live but one *Half-Year* after the Death of the Huſband, ſhe might have a *whole* Year's Rent, which would be unreaſonable.

One grants a Rent-Charge for Life, payable every *Lady Day* and *Michaelmas*; Grantee dies on *Michaelmas* Day after Sun-ſet, and before twelve at Night, yet adjudged he ſhould pay the Arrears to the Executor of the Grantee, in Regard the Grantee lived till Sun-ſet, which was the legal Time to demand it, and it cannot be demanded till due, eſpecially to make a Forfeiture of the Leaſe, &c. *Secus* if the Grantee had died on *Michaelmas* Day and before Sun-ſet.

But on the other Side it was argued, and ſolemnly decreed by the Maſter of the Rolls, that the Leſſor, in the principal Caſe, dying before Sun-ſet, and there being no Remedy for the Leſſor againſt the Leſſee, before his [the Leſſor's] Death, to compel the Payment of this Half-Year's Rent; and upon the Authority of *Clun's* Caſe, the Half-Year's Rent reſerved payable at *Michaelmes*, ſhould, upon the Death of the Leſſor before Sun-ſet, go to the Jointreſs, who then had the Reverſion;

mains due to Lady *Cole*, ſo as to intitle her Adminiſtrator thereto within the Conſtruction of this Deed?

Rich. Wyn pro Quer'.
Tho. Parker pro Deſt'.

I am of Opinion that this Money was due when by Law it ought to be paid; therefore, ſince the Lady *Cole* lived beyond Sun-ſet, which was the Time when the Money was demandable, and to be paid by the Tenant upon Pain of forfeiting his Leaſe, I think the Money was due to her, and ought to be paid to her, and that her Adminiſtrator is intitled to the ſame.

Jan. 18, 1706. *Robt. Tracy.*

Note, *J. Tracy* told me that he adviſed with Lord C. J. *Holt* at his Chambers, and that, upon View of the ſeveral Authorities relating to this Point, his Lordſhip was of the ſame Opinion.

But that as to the 18 *l.* Rent paid by one of the Tenants to the Leſſor upon *Michaelmas* Day in the Morning, this was a good Payment as to the Leſſee the Tenant, and he ſhould not be compelled to pay the ſame over again; but that the Executors of Sir *James*, that received this Half-Year's Rent, ſhould pay and account for the ſame unto Lady *Oxenden* the Jointreſs.

Q. As to the laſt Point; for if the 18 *l.* Rent was a good Payment at Law, (as certainly it was, according to *Clun*'s Caſe) why muſt it not be ſo in Equity?

(*a*) Precedents in Chancery 555.

Where Leſſor reſerves a Rent, and dies on the Rent-Day about twelve at Noon, if the Leaſe muſt determine by his Death, the Rent, rather than be loſt, ſhall go to his Executors. *Cont'* if the Leaſe is to have a Continuance.

(*b*) Vide 392. *Jenner* ver. *Morgan*.

See the Caſe of Lord *Strafford* verſus Lady (*a*) *Wentworth*, where Sir *Henry Johnſon* Tenant for Life, Remainder to his Wife Lady *Wentworth* for Life, made a Leaſe at Will rendering Rent; and died on *Michaelmas* Day betwixt three and four in the Afternoon, and before Sun-ſet; and Lord *Strafford*, as Adminiſtrator to Sir *Henry Johnſon* claiming the Rent,

Lord Chancellor Macclesfield held Lord *Strafford* well intitled thereto; and cited the above mentioned Caſe of *Cole* verſus *Bellaſis*, and ſaid, there was a Diverſity betwixt a Rent incident to a Reverſion that muſt go ſomewhere, (*b*) (if not to the Executor, then to the Heir) and where the Rent was to go no where, unleſs to the Executor; in the latter Caſe, if the Leſſor lived to the Beginning of that Day, at which Time, a voluntary Payment of the Rent might be made, this would be ſufficient to intitle the Executor or Adminiſtrator to the Rent, rather than that it ſhould be loſt; for it would be ſtrange, if the Tenant ſhould pay the Rent to none; and as that Caſe was, the Perſon in Remainder (*viz.* the Jointreſs) could have no Pretence to the Rent, it being a Leaſe at Will, and conſequently ſuch as could have no Continuance with Reſpect to her. (*c*)

(*c*) *Vide* the Act of the 11th *G.* 2. For the more effectual Securing the Payment of Rents, and Preventing Frauds by Tenants.

DE

Term. S. Hillarii,

1711. *B. R.*

Mitchel verſus *Reynolds*.

Caſe 44.

DEBT upon a Bond. The Defendant prayed *Oyer* of the Condition, which recited, That whereas the Defendant had aſſigned to the Plaintiff a Leaſe of a Meſſuage and Bakehouſe in *Liquorpond-ſtreet* in the Pariſh of St. *Andrew's Holborn*, for the Term of five Years: Now if the Defendant ſhould not exerciſe the Trade of a Baker within that Pariſh, during the ſaid Term, or, in Caſe he did, ſhould within three Days after Proof thereof made, pay to the Plaintiff the Sum of fifty Pounds, then the ſaid Obligation to be void. *Quibus Lectis & Auditis*, he pleaded, that he was a Baker by Trade, that he had ſerved an Apprenticeſhip to it, *ratione cujus* the ſaid Bond was void in Law, *per quod* he did Trade, *prout ei bene licuit*. Whereupon the Plaintiff demurred in Law.

Reſolution of the Court of *B. R.* A Bond or Promiſe to reſtrain one ſelf from trading in a particular Place, if made upon a reaſonable Conſideration, is good. *Secus* if it be on no reaſonable Conſideration, or to reſtrain a Man from trading at all.

And now, after this Matter had been ſeveral Times argued at the Bar, *Parker*, C. J. delivered the Reſolution of the Court.

The general Queſtion upon this Record is, Whether this Bond, being made in Reſtraint of Trade, be Good?

And We are all of Opinion, that a Special Conſideration being ſet forth in the Condition, which ſhews it was reaſonable for the Parties to enter into it, the ſame is good; and that the true Diſtinction in this Caſe is, not between Promiſes and Bonds, but between Contracts *with* and *without* Conſideration; and that wherever a ſufficient Conſideration appears to make it a proper and an uſeful Contract, and ſuch as cannot be ſet aſide without Injury to a fair Contractor, it ought to be maintained; but with this conſtant Diverſity, *viz.* Where the Reſtraint is general not to exerciſe a Trade thoughout the Kingdom, and where it is limited to a particular Place; for the former of theſe muſt be void, being of no Benefit to either Party, and only oppreſſive, as ſhall be ſhewn by and by.

The Reſolutions of the Books upon theſe Contracts ſeeming to diſagree, I will endeavour to ſtate the Law upon this Head, and to reconcile the jarring Opinions; in order whereunto, I ſhall proceed in the following Method.

1*ſt*, Give a general View of the Caſes relating to the Reſtraint of Trade.

2*dly*, Make ſome Obſervations from them.

3*dly*, Shew the Reaſons of the Differences which are to be found in theſe Caſes; And

4*thly*, Apply the whole to the Caſe at Bar.

As to the Caſes, they are either, firſt, of involuntary Contracts, againſt, or without, a Man's own Conſent; or Secondly, of voluntary Reſtraints by Agreement of the Parties.

Involuntary Reſtraints may be reduced under theſe Heads.

1*ſt*, Grants or Charters from the Crown.

2*dly*, Cuſtoms.

3*dly*, By-Laws.

Grants or Charters from the Crown may be,

1*ſt*, A new Charter of Incorporation to Trade generally, excluſive of all others, and this is void. 8 *Co.* 121.

2*dly*, A Grant to particular Perſons for the ſole Exerciſe of any known Trade; and this is void, becauſe it is a Monopoly, and againſt the Policy of the Common Law, and contrary to *Magna Charta.* 11 *Co.* 84.

3*dly*, A Grant of the Sole Uſe of a new invented Art, and this is good, being indulged for the Incouragement of Ingenuity; but this is tied up by the Statute of 21 *Jac.* 1. *cap.* 3. *ſect.* 6. to the Term of fourteen Years; for after that Time it is preſumed to be a known Trade, and to have ſpread itſelf among the People.

Reſtraints by Cuſtom are of three Sorts.

1*ſt*, Such as are for the Benefit of ſome particular Perſons, who are alledged to uſe a Trade for the Advantage of a Community, which are good. 8 *Co.* 125. *Cro. Eliz.* 803. 1 *Leon.* 142. *Mich.* 22 *H.* 6. 14. 2 *Bulſt.* 195. 1 *Roll. Abr.* 561.

2*dly*, For the Benefit of a Community of Perſons who are not alledged, but ſuppoſed to uſe the Trade, in order to exclude Foreigners. *Dyer* 279. *b. W. Jones* 162. 8 *Co.* 121. 11 *Co.* 52. *Carter* 68, 114, held good.

3*dly*, A Cuſtom may be good to reſtrain a Trade in a particular Place, though none are either ſuppoſed or alledged to uſe it; as in the Caſe of *Rippon. Regiſter* 105, 106.

Reſtraints of Trade by By-Laws are theſe ſeveral Ways.

1*ſt*, To exclude Foreigners; and this is good, if only to inforce a precedent Cuſtom by a Penalty. *Carter* 68, 114. 8 *Co.* 125. But where there is no precedent Cuſtom, ſuch By-Law is void. 1 *Roll. Abr.* 364. *Hob.* 210. 1 *Bulſt.* 11. 3 *Keb.* 808. But the Caſe in *Keble* is miſreported; for there the Defendants did not plead a Cuſtom to exclude Foreigners, but only generally to make By-Laws, which was the Ground of the Reſolution in that Caſe.

2*dly*, All By-Laws made to cramp Trade in general, are void. *Moor* 576. 2 *Inſt.* 47. 1 *Bulſt.* 11.

3*dly*, By-Laws made to reſtrain Trade, in order to the better Government and Regulation of it, are good, in ſome Caſes, (*viz.*) If they are for the Benefit of the Place, and to avoid publick Inconveniences, Nuſances, *&c.* Or for the Advantage of the Trade, and Improvement of the Commodity. *Sid.* 284. *Raym.* 288.

2 *Keb.* 27, 873, and 5 *Co.* 62. *b.* Which laſt is upon the By-Law for bringing all Broad-Cloth to *Blackwell-Hall*, there to be viewed and marked, and to pay a Penny *per* Piece for marking: This was held a reaſonable By-Law; and indeed it ſeems to be only a Fixing of the Market; for one End of all Markets is, that the Commodity may be viewed; but then they muſt not make People pay unreaſonably for the Liberty of trading there.

In 2 *Keb.* 309. the Caſe is upon a By-Law for reſtraining Silk-Throwſters from uſing more than ſuch a certain Number of Spindles, and there the By-Law would have been good, if the Reaſons given for it had been true.

Voluntary Reſtraints by Agreement of the Parties, are either,

1*ſt*, General, or

2*dly*, Particular, as to Places or Perſons.

General Reſtraints are all void, whether by Bond, Covenant, or Promiſe, *&c.* with or without Conſideration, and whether it be of the Party's own Trade, or not. *Cro. Jac.* 596. 2 *Bulſt.* 136. *Allen* 67.

Particular Reſtraints are either, 1*ſt*, without Conſideration, all which are void by what Sort of Contract ſoever created. 2 *H.* 5. 5. *Moor* 115, 242. 2 *Leon.* 210. *Cro. Eliz.* 872. *Noy* 98. *Owen* 143. 2 *Keb.* 377. *March* 191. *Show.* 2. (not well reported) 2 *Saund.* 155.

Or 2*dly*, Particular Reſtraints are with Conſideration.

Where a Contract for Reſtraint of Trade appears to be made upon a good and adequate Conſideration, ſo as to make it a proper and uſeful Contract, it is good. 2 *Bulſt.* 136. *Rogers* verſus *Parry.* Tho' that Caſe is wrong reported, as appears by the Roll which I have cauſed to be ſearched, it is *B. R. Trin.* 11 *Jac.* 1. *Rot.* 223. And the Reſolution of the Judges was not grounded upon it's being a particular Reſtraint, but upon it's being a particular Reſtraint with a Conſideration, and the Streſs lies on the Words, as the Caſe is here, though, as they ſtand in the Book, they do not ſeem material. *Noy* 98. *W. Jones* 13. *Cro. Jac.* 596. In that Caſe, all the Reaſons are clearly ſtated, and indeed all the Books, when carefully examined, ſeem to concur in the Diſtinction of Reſtraints general, and Reſtraints particular, and with or without Conſideration, which ſtands upon very good Foundation; *Volenti non fit injuria*; a Man may upon a valuable Conſideration, by his own Conſent, and for his own Profit, give over his Trade, and part with it to another in a particular Place.

Palm. 172. *Bragg* verſus *Stanner.* The Entring upon the Trade, and not whether the Right of Action accrued by Bond, Promiſe or Covenant, was the Conſideration in that Caſe.

Vide March's Rep. 77. but more particularly *Allen*'s 67. where there is a very remarkable Caſe, which lays down this Diſtinction, and puts it upon the Conſideration and Reaſon of the Thing.

Secondly, I come now to make ſome Obſervations that may be uſeful in the Underſtanding of theſe Caſes. And they are, 1ſt, That to obtain the Sole Exerciſe of any known Trade throughout *England*, is a compleat Monopoly, and againſt the Policy of the Law.

2dly, That when reſtrained to particular Places or Perſons, (if lawfully and fairly obtained) the ſame is not a Monopoly.

3dly, That ſince theſe Reſtraints may be by Cuſtom, and Cuſtom muſt have a good Foundation, therefore the Thing is not abſolutely, and in itſelf, unlawful.

4thly, That it is lawful, upon good Conſideration, for a Man to part with his Trade.

5thly, That ſince Actions upon the Caſe are Actions *injuriarum*, it has been always held, that ſuch Actions will lye for a Man's uſing a Trade contrary to Cuſtom, or his own Agreement; for there he uſes it *injuriouſly*.

6thly, That where the Law allows a Reſtraint of Trade, it is not unlawful to enforce it with a Penalty.

7thly, That no Man can contract not to uſe his Trade at all.

8thly, That a particular Reſtraint is not good without juſt Reaſon and Conſideration.

Thirdly, I propoſed to give the Reaſons of the Differences which we find in the Caſes; and this I will do,

1ſt, With Reſpect to involuntary Reſtraints, and

2*dly*, With Regard to ſuch Reſtraints as are voluntary.

As to involuntary Reſtraints, the firſt Reaſon why ſuch of theſe, as are created by Grants and Charters from the Crown and By-Laws, generally are void, is drawn from the Incouragement which the Law gives to Trade and honeſt Induſtry, and that they are contrary to the Liberty of the Subject.

2*dly*, Another Reaſon is drawn from *Magna Charta*, which is infringed by theſe Acts of Power; that Statute ſays, *Nullus liber homo, &c. diſſeiſetur de libero tenemento vel libertatibus, vel liberis conſuetudinibus ſuis, &c.* and theſe Words have been always taken to extend to Freedom of Trade.

But none of the Caſes of Cuſtoms, By-Laws to enforce theſe Cuſtoms, and Patents for the ſole Uſe of a new invented Art, are within any of theſe Reaſons; for here no Man is abridged of his Liberty, or diſſeiſed of his Freehold; a Cuſtom is *Lex loci*, and Foreigners have no Pretence of Right in a particular Society, exempt from the Laws of that Society; and as to new invented Arts, no Body can be ſaid to have a Right to that which was not in Being before; and therefore it is but a reaſonable Reward to Ingenuity and uncommon Induſtry.

I ſhall ſhew the Reaſon of the Differences in the Caſes of voluntary Reſtraint,

1*ſt*, Negatively.

2*dly*, Affirmatively.

1*ſt*, Negatively; The true Reaſon of the Diſallowance of theſe in any Caſe, is never drawn from *Magna Charta*; for a Man may, voluntarily, and by his own Act, put himſelf out of the Poſſeſſion of his Freehold, he may ſell it, or give it away at his Pleaſure.

2*dly*, Neither is it a Reaſon againſt them, that they are contrary to the Liberty of the Subject; for a Man may, by his own Conſent, for a valuable Conſideration, part with his Liberty; as in the Caſe of a Covenant not to erect a Mill upon his own Lands. *J. Jones* 13. *Mich.* 4 *Ed.* 3. 57. And when any of theſe are at any Time mentioned as Reaſons upon the Head of voluntary Reſtraints, they are to be taken only as general Inſtances of the Favour and Indulgence of the Law to Trade and Induſtry.

3*dly*, It is not a Reaſon againſt them, that they are againſt Law, I mean, in a proper Senſe, for in an improper Senſe they are.

All the Inſtances of Conditions againſt Law in a proper Senſe, are reducible under one of theſe Heads.

1*ſt*, Either to do ſomething that is *Malum in ſe*, or *Malum prohibitum.* 1 *Inſt.* 206.

2*dly*, To omit the doing of ſomething that is a Duty. *Palm.* 172. *Hob.* 12. *Norton* verſus *Sims.*

3*dly*, To incourage ſuch Crimes and Omiſſions. *Fitzherb.* tit. *Obligation*, 13. *Bro.* tit. *Obligation*, 34. *Dyer* 118.

Such Conditions as theſe, the Law will always, and without any Regard to Circumſtances, defeat, being concerned to remove all Temptations and Inducements to thoſe Crimes; and therefore, as in 1 *Inſt.* 206. a Feoffment ſhall be abſolute for an unlawful Condition, and a Bond void. But from hence I would infer,

1*ſt*, That where there may be a Way found out to perform the Condition, without a Breach of the Law, it ſhall be good. *Hob.* 12. *Cro. Car.* 22. *Perk.* 228.

2*dly*, That all Things prohibited by Law, may be reſtrained by Condition; and therefore theſe particular Reſtraints of Trade, not being againſt Law, in a proper Senſe, as being neither *Mala in ſe*, nor *Mala prohibita*, and the Law allowing them in ſome Inſtances, as in thoſe of Cuſtoms and *Aſſumpſits*, they may be reſtrained by Condition.

2*dly*, Affirmatively; The true Reaſons of the Diſtinction upon which the Judgments in theſe Caſes of voluntary Reſtraints are founded, are, 1*ſt*, The Miſchief which may ariſe from them, 1*ſt*, to the Party, by the Loſs of his Livelihood, and the Subſiſtence of his Family; 2*dly*, to the Publick, by depriving it of an uſeful Member.

Another Reaſon is, the great Abuſes theſe voluntary Reſtraints are liable to; as for Inſtance, from Corporations, who are perpetually labouring for excluſive Advantages in Trade, and to reduce it into as few Hands as poſſible; as likewiſe from Maſters, who are apt to give their Apprentices much Vexation on this Account, and to uſe many indirect Practices to procure ſuch Bonds from them, leſt they ſhould prejudice them in their Cuſtom, when they come to ſet up for themſelves.

3*dly*, Becauſe in a great many Inſtances, they can be of no Uſe to the Obligee; which holds in all Caſes of general Reſtraint throughout *England*; for what does it ſignify to a Tradeſman in *London*, what another does at *Newcaſtle*? and ſurely it would be unreaſonable to fix a certain Loſs on one Side, without any Benefit to the other. The *Roman* Law would not inforce ſuch Contracts by an Action. See (*a*) *Puff. lib.* 5. *c.* 2. *ſect.* 3. 21 *H.* 7. 20.

4*thly*, The fourth Reaſon is in Favour of theſe Contracts, and is, that there may happen Inſtances wherein they may be uſeful and beneficial, as to prevent a Town from being over-ſtocked with any particular Trade; or in caſe of an old Man, who finding himſelf under ſuch Circumſtances either of Body or Mind, as that he is likely to be a Loſer by continuing his Trade, in this Caſe it will be better for him to part with it for a Conſideration, that by ſelling his Cuſtom, he may procure to himſelf a Livelihood, which he might probably have loſt, by trading longer.

5*thly*, The Law is not ſo unreaſonable, as to ſet aſide a Man's own Agreement for Fear of an uncertain Injury to him, and fix a certain Damage upon another; as it muſt do, if Contracts with a Conſideration were made void. *Barrow* verſus *Wood*, *March Rep.* 77. *Mich.* 7 *Ed.* 3. 65. *Allen* 67. 8 *Co.* 121.

But here it may be made a Queſtion, that ſuppoſe it does not appear whether or no the Contract be made upon good Conſideration, or be meerly injurious and oppreſſive, what ſhall be done in this Caſe?

Reſp. I do not ſee why that ſhould not be ſhewn by Pleading; though certainly the Law might be ſettled either Way without Prejudice; but as it now ſtands, the

---

(*a*) The Inſtances there mentioned are, that if any ſhould agree not to waſh their Hands, or change their Linen, for ſuch a Time, there could be no need to trouble a Magiſtrate on the Breach of ſuch Agreements, which would tend to no Conſequence, when put in Execution.

the Rule is, that wherever ſuch Contract *ſtat indifferenter*, and for ought appears, may be either good or bad, the Law preſumes it *prima facie* to be bad, and that for theſe Reaſons:

1*ſt*, In Favour of Trade and honeſt Induſtry.

2*dly*, For that there plainly appears a Miſchief, but the Benefit (if any) can be only preſumed; and in that Caſe, the preſumptive Benefit ſhall be over-born by the apparent Miſchief.

3*dly*, For that the Miſchief (as I have ſhewn before) is not only private, but publick.

4*thly*, There is a Sort of Preſumption, that it is not of any Benefit to the Obligee himſelf, becauſe, it being a general Miſchief to the Publick, every Body is affected thereby; for it is to be obſerved, that tho' it be not ſhewn to be the Party's Trade or Livelihood, or that he had no Eſtate to ſubſiſt on, yet all the Books condemn thoſe Bonds, on that Reaſon, (*viz.*) as taking away the Obligor's Livelihood, which proves that the Law preſumes it; and this Preſumption anſwers all the Difficulties that are to be found in the Books.

As 1*ſt*, That all Contracts, where there is a bare Reſtraint of Trade and no more, muſt be void; but this taking Place, only where the Conſideration is not ſhewn, can be no Reaſon why, in Caſes where the ſpecial Matter appears, ſo as to make it a reaſonable and uſeful Contract, it ſhould not be good; for there the Preſumption is excluded, and therefore the Courts of Juſtice will inforce theſe latter Contracts, but not the former.

2*dly*, It anſwers the Objection, that a Bond does not want a Conſideration, but is a perfect Contract without it; for the Law allows no Action on a *Nudum pactum*, but every Contract muſt have a Conſideration, either expreſſed, as in *Aſſumpſits*, or implied, as in *Bonds* and *Covenants*; but theſe latter, tho' they are perfect as to the Form, yet may be void as to the Matter; as in a Covenant to ſtand ſeiſed, which is void without a Conſideration, tho' it be a compleat and perfect Deed.

3*dly*, It ſhews why a Contract not to trade in any Part of *England*, tho' with Conſideration, is void; for there is ſomething more than a Preſumption againſt it, becauſe it can never be uſeful to any Man to reſtrain another from trading in all Places; tho' it may be, to reſtrain him from trading in ſome, unleſs he intends a Monopoly, which is a Crime.

4*thly*, This ſhews why Promiſes in Reſtraint of Trade have been held good; for in thoſe Contracts, it is always neceſſary to ſhew the Conſideration; ſo that the Preſumption of Injury could not take place, but it muſt be governed by the ſpecial Matter ſhewn. And it alſo accounts not only for all the Reſolutions, but even all the Expreſſions that are uſed in our Books in theſe Caſes; it at leaſt excuſes the Vehemence of Judge *Hall* in 2 *H.* 5. *Fol. quinto*; for ſuppoſe, (as that Caſe ſeems to be) a poor Weaver, having juſt met with a great Loſs, ſhould, in a Fit of Paſſion and Concern, be exclaiming againſt his Trade, and declare, that he would not follow it any more, *&c.* at which Inſtant, ſome deſigning Fellow ſhould work him up to ſuch a Pitch, as, for a trifling Matter, to give a Bond not to work at it again, and afterwards, when the Neceſſities of his Family, and the Cries of his Children, ſend him to the Loom, ſhould take Advantage of the Forfeiture, and put the Bond in Suit; I muſt own, I think this ſuch a Piece of Villany, as is hard to find a Name for; and therefore cannot but approve of the Indignation that Judge expreſſed, tho' not his Manner (*a*) of expreſſing it. Surely it is not fit that ſuch unreaſonable miſchievous Contracts ſhould be countenanced, much leſs executed by a Court of Juſtice.

As to the general indefinite Diſtinction made between Bonds and Promiſes in this Caſe, it is in plain Words this, that the Agreement it ſelf is good, but when it is reduced into the Form of a Bond, it immediately becomes void; but for what Reaſon ſee 3 *Lev.* 241. Now a Bond may be conſidered two Ways, either as a Security, or as a Compenſation; and

1*ſt*, Why ſhould it be void as a Security? Can a Man be bound too faſt from doing an Injury? which I have proved the Uſing of a Trade contrary to Cuſtom or Promiſe, to be.

2*dly*, Why ſhould it be void as a Compenſation? Is there any Reaſon why Parties of full Age, and capable of contracting, may not ſettle the *Quantum* of Damages for ſuch an Injury? *Bract. Lib.* 3. *c.* 2. §. 4.

(*b*) Poſt in *Grantham* verſus *Gordon*, 614.

It would be very ſtrange, that the Law of *England* that (*b*) delights ſo much in Certainty, ſhould make a Contract void, when reduced to Certainty, which was good, when looſe and uncertain; the Caſes in *March*'s *Rep.* 77, 191. and alſo *Show.* 2. are but indifferently reported, and not warranted by the Authorities they build upon.

1*ſt Object.* In a Bond the whole Penalty is to be recovered, but in *Aſſumpſit* only the Damages.

(*a*) *Hall* expreſſed himſelf thus: *A ma Intent vous purres aver demurre ſur Luy que le Obligation eſt void, eo que le Condition eſt encountre Common Ley,* & per Dieu *Si le Plaintiff fuit icy, il irra al priſon tanq; il uſt fait Fine au Roy.*

Reſp. This Objection holds equally againſt all Bonds whatſoever.

2d Object. Another Objection was, that this is like the Caſe of an Infant, who may make a Promiſe but not a Bond, or that of a Sheriff who cannot take a Bond for Fees.

Reſp. The Caſe of an Infant ſtands on another Reaſon, (*viz.*) a general Diſability to make a Deed; but here both Parties are capable; neither is it the Nature of the Bond, but meerly the Incapacity of the Infant, which makes a Bond by him void, ſince there a Surety would be liable, but it is otherwiſe here.

Alſo the Caſe of a Sheriff is very different; for at Common Law he could take nothing for doing his Duty, but the Statute has given him certain Fees; but he can neither take more, nor a Chance for more, than that allows him.

3d Object. It was further objected, that a Promiſe is good, and a Bond void, becauſe the former leaves the Matter more at large to be tried by a Jury; but what is there to be tried by a Jury in this Caſe?

Reſp. 1*ſt*, It is to be tried, whether upon Conſideration of the Circumſtances the Contract be good or not? and that is Matter of Law, not fit for a Jury to determine.

2*dly*, It is to aſcertain the Damages, but *Cui bono* (ſay they) ſhould that be done? is it for the Benefit of the Obligor?

Reſp. Certainly it may be neceſſary on that Account, for theſe Reaſons:

1*ſt*, A Bond is a more favourable Contract for him than a Promiſe; for the Penalty is a Re-purchaſe of his Trade aſcertained before-hand, and on Payment thereof he ſhall have it again; he may rather chuſe to be bound not to do it under a Penalty, than not to do it at all.

2*dly*, However it be, it is his own Act.

3*dly*, He can ſuffer only by his Knavery, and ſurely Courts of Juſtice are not concerned leſt a Man ſhould pay too dear for being a Knave.

4*thly*, Reſtraints by Cuſtom may (as I have proved) be inforced with Penalties which are impoſed without the Party's Conſent, nay by the injured Party without the Concurrence of the other; and if ſo, then *a fortiori* he may bind himſelf by a Penalty.

Object. It may perhaps be objected, that a falſe Recital of a Conſideration in the Condition may ſubject a Man to an Inconvenience, which the Law ſo much labours to prevent.

Reſp. But this is no more to be preſumed than falſe Teſtimony, and in ſuch a Caſe, I ſhould think the Defendant might aver againſt it; for tho' the Rule be, that a Man is eſtopped from averring againſt any Thing in his own Deed, yet that is, ſuppoſing it to be his Deed, for where it is void, it is otherwiſe, as in the Caſe of an uſurious Contract.

The Application of this to the Caſe at Bar is very plain: Here the particular Circumſtances and Conſideration are ſet forth, upon which the Court is to judge, whether it be a reaſonable and uſeful Contract.

The

The Plaintiff took a Baker's Houſe, and the Queſtion is, whether he or the Defendant ſhall have the Trade of this Neighbourhood? the Concern of the Publick is equal on both Sides.

What makes this the more reaſonable is, that the Reſtraint is exactly proportioned to the Conſideration, (*viz.*) the Term of five Years.

To conclude: In all Reſtraints of Trade, where nothing more appears, the Law preſumes them bad; but if the Circumſtances are ſet forth, that Preſumption is excluded, and the Court is to judge of thoſe Circumſtances, and determine accordingly; and if upon them it appears to be a juſt and honeſt Contract, it ought to be maintained.

For theſe Reaſons we are of Opinion, that the Plaintiff ought to have Judgment.

DE

Term. Paſchæ,

1712.

Nichols verſus *Hooper*.

Caſe 45.
Lord Keeper Harcourt.
2 Vern. 686.
Legacy given upon a Man's dying without Iſſue; the Man dies leaving Iſſue, which Iſſue within ſix Months after died without Iſſue: The Legacy not due, it not being intended to ariſe upon any remoter Contingency than the Man's dying without Iſſue living at his Death.

JOHN Jackſon ſeiſed in Fee deviſed Lands to his Wife *Mary* for Life, Remainder to his Son *Thomas Jackſon* and his Heirs; provided, that if the ſaid *Thomas Jackſon* ſhould die ***without Iſſue of his Body***, then he gave 100 *l.* a-piece to his two Nieces *A.* and *B.* to be paid within ſix Months after the Death of the Survivor of the ſaid Mother and Son, by the Perſon who ſhould inherit the Premiſſes; and in Default of Payment, as aforeſaid, then the Teſtator deviſed the Lands to the Legatees for Payment, and died.

The Teſtator's Wife *Mary* died, and the Son *Thomas Jackſon* died, leaving a Daughter, which Daughter, within the ſaid ſix Months after the Death of her Father *Thomas Jackſon*, died alſo without Iſſue; the Bill was to have the 200 *l.* And for the Plaintiffs

It was urged, That though *Thomas Jackſon* left Iſſue living at the Time of his Death, yet when that Iſſue died without Iſſue, then did *Thomas Jackſon* die without Iſſue; that if a Man ſhould deviſe Lands to *A.* in Tail, and if *A.* died without Iſſue, then to *B.* if *A.* ſhould leave Iſſue, and that Iſſue ſhould afterwards die without Iſſue, *B.*'s Eſtate would plainly commence. So if a Rent were limited to commence upon Tenant in Tail's Dying without Iſſue, if Tenant in Tail left Iſſue, that afterwards died without Iſſue, the Rent muſt commence; and it was ſaid to be the ſtronger, in regard, in this Caſe, here was a Death without Iſſue within ſix Months after the Death of the Survivor; (*ſcil.*) the Iſſue of *Thomas* died without Iſſue within ſix Months after the Death of *Thomas* her Father.

Vernon & Cur' cont': *Thomas Jackſon* is not by this Will made Tenant in Tail, but continues Tenant in Fee-ſimple; ſo that this is not like the Limitation of an Eſtate; for it is agreed, that in caſe of Limitation of Eſtates, in Conſtruction of Law, whenever there is a Failure of Iſſue of *J. S.* tho' *J. S.* died leaving Iſſue at his Death, yet from that Time *J. S.* is dead without Iſſue.

But where a Legacy is given by a Will, to commence upon this Contingency, (*ſcil.*) *If* J. S. *ſhall die without Iſſue*, this ſhall be taken according to (*a*) common Parlance, (*viz.*) Iſſue living at his Death; for, in common Parlance, if *J. S.* leaves Iſſue, he does not die without Iſſue; and it cannot be intended that the Teſtator deſigned, whenever there ſhould be a Failure of Iſſue of *Thomas*, (which might be 100 Years hence,) that then theſe Legacies, which were meant only as *perſonal Proviſions*, ſhould take Effect.

(*a*) Vide poſt *Target* verſus *Gaunt*, 432. and *Pinbury* verſus *Elkin*, 565.

However, in this Caſe, with Reſpect to the Legatees, if the Legacies take any Effect, the Words of the Deviſe paſs a legal Intereſt, and the Court does not hinder the Plaintiffs from proceeding at Law, in an Ejectment, but diſmiſſes the Bill.

Note, This differed from the Caſe of *Goodwin* verſus *Clark,* 1 *Lev.* 35. where a Settlement was on Huſband and Wife for their Lives, Remainder to the firſt, *&c.* Son in Tail Male; and if the Huſband ſhould die without Iſſue Male, Remainder to the Daughters for a Term of Years, for the raiſing of 1500 *l.* for their Portions; and the Huſband died leaving Iſſue a Son and a Daughter, after which the Son died without Iſſue:

Whereupon it was adjudged, that the Daughter ſhould have the 1500 *l.* for that whenever the Iſſue Male of the Huſband failed, he might properly be ſaid to be dead without Iſſue Male. 8 *Co.* 86. *Buckmere's* Caſe. And this very Expectation, remote and precarious as it was, (for there being an Eſtate-tail, a Recovery ſuffered by the Tenant in Tail would have barred the Portions expectant thereupon) was, notwithſtanding, of Advantage to the Daughters with Reſpect to their Advancement in Marriage; whereas in the principal Caſe, the Eſtate being a Fee, no Recovery could be ſuffered thereof, and conſequently there was Danger of a Perpetuity.

DE
Term. S. Trinitatis,
1712.

Herne verſus *Meyrick*.

ONE ſeiſed of Lands in Fee, owed Money by ſeveral Bonds, and by Will gave ſeveral Legacies to his younger Children, and deviſed his Lands to his eldeſt Son in Tail.

Caſe 46.
Lord Keeper Harcourt.
Salk. 416.

One ſeiſed in Fee owes Debts by Bond, and deviſes his Lands to his Heir in Tail, and gives ſeveral Legacies; after which he dies leaving the Heir his Executor: The Heir with the perſonal Eſtate pays off the Bond-Debts, by which Means there are not Aſſets to pay the Legacies; the Legatees are without Remedy, the Land being deviſed in Tail to the Heir. Otherwiſe had the Land deſcended to ſuch Heir in Fee.

The eldeſt Son (who was likewiſe Executor) had paid the Bonds with the perſonal Eſtate; and now the Legatees brought their Bill, praying that they might ſtand in the Place of the Bond-Creditors, and be paid out of the Lands deviſed to the eldeſt Son, the late Statute againſt fraudulent Deviſes having made the Deviſe void as againſt Bond-Creditors.

And this Cauſe being heard before the Maſter of the Rolls, his Honour declared, he would marſhal the real and perſonal Aſſets, in ſuch Manner, as that the Debts and Legacies ſhould both be paid, (*viz.*) the Legacies out of the perſonal, and the Bonds out of the real Eſtate, and that as the Bonds had been paid by the Executor out of the perſonal Eſtate, ſo the Legatees ſhould, *pro tanto*, ſtand in the Place of ſuch Bond-Creditors, and be paid out of the real Eſtate.

(a) 25 *Octob.* 1712.

But from this Decree there was afterwards an Appeal (*a*) to the Lord Keeper, before whom it was urged by the Solicitor General and Mr. *How*, that theſe younger Children were provided for by other Land deviſed to them; and that, in Caſe the Legacies were to be charged upon the Land of the eldeſt Son, he would be left deſtitute.

That it was as much the Intent of the Teſtator, that the Deviſee ſhould have the Land, as it was, that the Legatees ſhould have their Legacies; and therefore the one not to be favoured more than the other; nay, that the Rule in Equity was, that Specifick Legacies ſhould not be broke into, in order to the Satisfaction of pecuniary Ones; that if in this Caſe, the Deviſe had been of a Leaſe for *Years* to the Heir, he ſhould have kept *that*, without having it made liable to the pecuniary Legacies, and ſhould the Heir be in a worſe Caſe, in reſpect of Lands of *Inheritance* deviſed to him, than if he had only claimed a *Chattel* by the Will?

That the Statute of fraudulent Deviſes was intirely out of the Caſe, in regard there were no Creditors, and that Statute was never made to help Legatees.

Theſe Reaſons ſeemed to have great Weight with the Lord Keeper, who ſaid, it would have been a very different Caſe, had the Lands been ſuffered to deſcend in Fee; whereas the Gift in Tail to the Heir was a Specifick Deviſe, and, as againſt Legatees, to be favoured equally with a Specifick Legacy.

Mr. *Vernon* on the other Side inſiſted, That the younger Children were in nature of Creditors, and in Caſe a Copyhold, not ſurrendered, were deviſed to them, the Court would ſupply the Want of a Surrender.

Sed per Cur', Here it appears the younger Children are otherwiſe provided for.

Vern. The Caſe might have been Different, if the Teſtator had deviſed his Land to his eldeſt Son, *exempt* from the Payment of his Legacies; but thoſe Words being omitted in the Will, the Statute againſt fraudulent Deviſes charges the Land deviſed with the Bonds.

But by Lord Keeper, there being no Debts, the Statute is out of the Caſe.

Then it was inſiſted, that whereas in this Caſe one and the ſame Perſon was Heir, and Executor, ſuppoſe they had been different Perſons, (*viz.*) one Perſon Heir, and another Executor, and the Bond-Creditors had ſued the Heir, and recovered their Debts out of the real Eſtate, the Heir ſhould clearly have had no Remedy; and there was no Reaſon that the Heir, when made Executor, ſhould alter the Caſe, by his partial Application of the Aſſets.

However, Lord Keeper inclined, that the Heir being Deviſee in Tail of the Lands, the Legatees ſhould have no Remedy to come upon the real Eſtate in the Place of the Bond-Creditors; but ſaid, he would reſerve that Point; and in the mean Time, would direct an Account of the Perſonal Eſtate, which, for ought appeared, might be ſufficient to pay the Legacies as well as Debts; and likewiſe ordered, that Precedents ſhould be ſearched, whether ever a Legatee had Relief againſt the Heir in ſuch Caſe?

Afterwards in the Caſe of (*a*) *Clifton* verſus *Birt* (*Michaelmas* Term 1720) this decretal Order of *Hern* verſus *Meyrick* was produced, and it appeared, that this Caſe was not reſolved by Lord *Harcourt*, but adjourned for further Conſideration.

(*a*) Which ſee poſt 681. So though the Court will marſhal the Aſſets in Favour of a Simple Contract Creditor, and (generally ſpeaking) in Favour of a Legatee, yet where ſuch Legatee is a pecuniary One, he will not be relieved by being permitted to come in the Place of the Bond-Creditors upon the Land, in the Hands of a Deviſee thereof.

Caſe 47.
Lord Keeper Harcourt.

Diſher verſus *Diſher*.

A Freeman of *London* ſigns a Note, by which he owns himſelf indebted in 5000 *l.* to his Brother and Heir; but his Brother knows nothing of it; the Freeman keeps this Note always in his own Cuſtody, and on his Death it is found among his Papers. Adjudged a void Note, and as a Matter intended, and not perfected.

WILLIAM *Diſher* was a Freeman of *London*, and had neither Wife nor Child, but had an only Brother the Plaintiff.

This *William Diſher* (though no Ways indebted to the Plaintiff the Brother) by Note under his Hand dated 24 *February* 1707, promiſed to pay the Plaintiff 5000 *l.* but the Plaintiff knew nothing of it.

The Note was kept by *William Diſher* in his own Cuſtody, and, at his Death, was found among his Papers.

April 1708. *William Diſher* intermarried with *Elizabeth Thomas*, and being poſſeſſed of 291 *l.* 14 *s.* 10 *d.* *per Annum*, upon Bankers Aſſignments, (which are eſtabliſhed by Act of Parliament, and made a perpetual Annuity redeemable by Parliament, and are thereby to go to Executors) and being alſo ſeiſed in Fee of Lands of 69 *l. per Annum*, in *Houghton* in *Bedfordſhire*, previous to his ſaid Marriage, and in Conſideration thereof conveyed over his Lands to Truſtees and their Heirs, to the Uſe of himſelf for Life, Remainder to Truſtees to preſerve contingent Remainders, Remainder to *Elizabeth* his intended Wife for her Life, Remainder to the firſt, *&c.* Son of the Marriage in Tail Male ſucceſſively, Remainder to the Daughters in Tail, Remainder to himſelf in Fee; and, having aſſigned over his Annuities to the ſame Truſtees, did, by another Deed, bearing the ſame Date, declare the ſame to be in Truſt, that the Truſtees ſhould pay and apply the ſaid yearly Annuities, to ſuch Perſons, as ſhould be intitled to the Profits of the Land ſo ſettled as aforeſaid; and in Caſe the Principal ſhould be paid in, according to the Act of Parliament in that behalf made, that then the Truſtees ſhould lay out the Monies in the Purchaſe of Freehold or Copyhold Lands to be ſettled to the ſame Uſes.

One ſettles Land, on his Marriage, on himſelf and Wife, and Iſſue of the Marriage, Remainder over, and aſſigns Bankers Aſſignments (which are but perſonal Eſtate) to Truſtees, and declares the Profits thereof to go to the ſame Perſon, as by the Settlement would be intitled to the Land; and if the Annuity ſhould be redeemed by Parliament, the Money to be inveſted in Land, and to be ſettled to the ſame Uſes, and dies. Theſe Annuities and Bankers Aſſignments, after the Wife's Death, ſhall go to the Heir, and not to the Executor.

Afterwards Mr. *Diſher* died without Iſſue, and leaving no Will, but what he had made before his Marriage, in which he had given ſeveral Legacies and Bequeſts, (all which Deviſes were revoked by his ſubſequent Settlement) and had made one *Jacob Sawbridge* who was no Relation, but had been his Apprentice, his Executor.

On a Bill brought by the Plaintiff *John Diſher*, the Brother and Heir, againſt the Teſtator's Widow and the Executor, it was decreed, that theſe Annuities being redeemable by Parliament, were as a Mortgage aſſigned to Truſtees, and directed, when paid in, to be inveſted in a Purchaſe, and ſettled as the Fee-Simple Lands were above ſettled; and therefore, though the Wife was to have an Eſtate for Life in the Annuities by her Jointure Deed, yet, after her Death, the Annuities ſhould not be looked upon as perſonal Eſtate, a Moiety of which, on ſuch Conſtruction, would by the Cuſtom of *London* belong to her Repreſentatives, but as Money directed to be laid out in Lands, and to be as a real Eſtate, which, after the Wife's Death, would go to the Plaintiff as Heir of *William Diſher*.

Decreed alſo, with regard to this 5000*l.* Note ſigned by the Teſtator, by which he owned himſelf indebted to his Brother the Plaintiff in 5000 *l.* that it being always kept by the Teſtator in his own Cuſtody, and the Brother knowing nothing of it, when given, and at the Teſtator's Death it being found among his Papers, the ſame ſhould be looked upon only as a Matter *initiate*, or *intended*, and *never perfected*; and though it was urged, that however it muſt be admitted the Note was in Fraud of the Cuſtom, as to the Wife, it ſhould, notwithſtanding, be paid out of the dead Man's Moiety: Yet the Court ſaid they eſteemed it as no Debt at all.

DE

Term. S. Michaelis,

1712. *B. R.*

Domina Regina verſus *Ballivos & Burgenſes de Bewdley in Comitatu Wigorniæ.*

Caſe 48.

A WRIT of *Scire Facias* iſſued out of the Petty Bag in Chancery to repeal the Charter granted to this Borough *ſeptimo Annæ Regin'.* Whereupon Iſſue being joined, and the Record tranſmitted into the Crown-Office of the Queen's Bench, in *Trinity*-Term *undecimo Annæ*, the Cauſe was tried at the Bar of that Court.

The Points in Iſſue were,

1*ſt*, Whether one *Thomas Smith* was duly elected Bailiff on the 25th of *September* 1707?

2*dly*, Whether there were a Bailiff and Burgeſſes (*i. e.* a Corporation) in Being at the Time of granting this Charter?

3*dly*, Whether that Corporation refuſed this Charter?

The Caſe upon Evidence was, in Subſtance, the ſame with the State of it in the printed Sheet: The two former were the principal Queſtions; and the Proof upon them was in ſhort this:

As to the firſt Point, it appeared, that by the Charter of *Jac.* 1. all the Burgeſſes (as well Common, as Capital,) had a Right of voting in the Election of a Bailiff, and that a Bailiff might be choſen out of the Burgeſſes.

That *Smith* was a Common Burgeſs under that Charter, and that he was elected after the Invalidity of King *James* II.'s Charter was publickly known and acknowledged; and that the Common Burgeſſes qualified under the old Charter were then admitted to vote, (which had not been done from the Time of accepting King *James* II.'s Charter, to that Day,) and that *Smith* had the Majority of thoſe Burgeſſes; but it appeared, that one *Coldwell* the Bailiff for the Time being, who preſided at this Election and took the Poll, was in by Virtue of the void Charter, and that he was never ſo much as a common Burgeſs under the old Charter.

That he acted with fourteen Capital Burgeſſes, which is the Number appointed by the void Charter, and that the Burgeſſes qualified by that Charter were called, and voted promiſcuouſly with thoſe qualified by the old.

2*dly*, As to the ſecond Point, it appeared that by the Charter of King *James* I. the Bailiff and Capital Burgeſſes were to do all Corporate Acts, and were originally to chuſe in the Common Burgeſſes.

That upon the Death, or Vacancy of any of the Capital Burgeſſes, the Charter appoints that *Reſiduum Capital' Burgens' vel Major pars eorund'*, ſhall chuſe in others within fifteen Days after ſuch Vacancy; that they had neglected to fill up Vacancies for theſe twenty-two Years laſt paſt, and that at the Time of granting the Charter of her preſent Majeſty, there was only one capital Burgeſs in Being (*viz.* one *Slade*) qualified under the Charter of King *James* the Firſt.

Upon this Evidence ſeveral Queſtions in Law aroſe.

1*ſt*, As to *Smith*'s Election, whether that muſt not be taken to be one intire Act done under the Direction of the illegal Bailiff by Virtue of the Charter of King *James* the Second, and conſequently void; the old Burgeſſes having ſubmitted to be called by that Bailiff, and voted promiſcuouſly with the Others, without Diſtinction?

2*dly*, Whether according to the Charter of King *James* the Firſt, the Capital Burgeſſes were not to be taken to be extinct, there being but one remaining?

3*dly*, The Capital Burgeſſes being an integral Part of the Body, by the old Charter, whether the Corporation could ſubſiſt without Them, or muſt, in Defect of Them, be diſſolved?

After ſome Debate at the Bar, the Counſel for the Defendants prayed a Special Verdict, and the Chief Juſtice, in ſumming up the Evidence, directed the Jury to reſerve theſe Points; for that they were of too great Moment to be determined without Conſideration; but ſome Diſputes ariſing thereupon among the Judges,

Parker, Chief Juſtice, ſaid, that the Election of *Smith* to be Bailiff ſeemed to him to be made under the void Charter, and that it could not be under any other; that *Coldwell* was Bailiff under that Charter, and all the Voters ſubmitted to his Authority, which the old Burgeſſes ought not to have done, but to have inſiſted upon their ancient Right, and oppoſed the Others joining with Them; that it was a particular Power given by the Charter, and, in ſome Degree, like the Caſe of *Wroth* verſus *Wigs*, 4 *Rep*. 39. *b*. very different from the Caſe of electing Members of Parliament (which had been mentioned at the Bar) for there they all come under Pretence of the ſame Right, and by a proper Authority to chuſe.

But ſuppoſing *Smith* was duly elected, there was no proper Officer to ſwear him in, neither Bailiff, nor Recorder, by the Charter of King *James* the Firſt; for *Coldwell* was not ſo much as Bailiff *de Facto*, but a Bailiff of a different Corporation, as effectually as if he had been Bailiff of another Town. To make him a Bailiff *de Facto*, he muſt have been in under a right Conſtitution; whereas he was in by a void one, and had no Pretence of Right by the old Charter.

As to the ſecond Queſtion his Lordſhip ſaid, he could not think it within the Intention of the Charter, which appoints the Vacancies of the Capital Burgeſſes to be filled up within fifteen Days, that twenty-two Years ſhould be permitted to elapſe, till theſe were all extinct to one Man, and that one to have the Power of electing all the Reſt.

As to the third, He thought it a Queſtion of great Moment, whether this Corporation could ſubſiſt without Capital Burgeſſes, they being made neceſſary to all corporate Acts?

Powell J. could not think the Corporation were diſſolved for want of Capital Burgeſſes, but doubted whether they could Act; that it was not material whether *Coldwell* was a lawful Bailiff, or not; for that the Corporation might, upon their Charter-day, chuſe a Bailiff, tho' there were none then in Being, nor had been for twenty Years before; not like the Caſe of *Wroth* and *Wigs*, for that was of a judicial Authority.

(*a*) *Eyre* J. thought the third Queſtion very conſiderable, (*viz.*) Whether, if a Corporation loſes one of its integral Parts, it be not diſſolved? *vide* 1 *Roll. Abr. pag.* 514. tit. *Corporations*; the Caſe of a Corporation conſiſting of Brothers and Siſters.

As to the ſecond Queſtion, he ſaid, that when a Corporation lapſes the Day of chuſing its Head, the Royal Authority muſt interpoſe; and in the *Interim*, the Operation of it ceaſes. That in this Caſe there had not been a regular Election of a Bailiff for ſeveral Years.

That if *Smith* was choſen in Execution of the Charter of *Jac.* 2. tho' at an Aſſembly not under that Charter, he was in by Virtue thereof; that it was held in the Caſe of the *Devizes*, that a good Mayor for the Time being, is neceſſary to the Election of another.

Notwithſtanding the *Court* was ſo *doubtful* in theſe Points, the *Jury* were, however, *very clear* in them; and about

---

(*a*) *Note*; Mr. Juſtice *Littleton Powis* was abſent all this Term, being indiſpoſed with the Gout.

about three of the Clock next Morning gave a privy Verdict, by which they found all the Iſſues generally for the Queen, and affirmed it at the Bar about ten; and tho' they were ſent out again by the Court, perſiſted with great Obſtinacy.

Hereupon the Defendants came and moved that the Verdict might be ſet aſide, upon theſe two Points:

1*ſt*, For that the Jury had ſound Matter of Law, and contrary to Direction.

Where the Jury bring in their Verdict contrary to the Direction of the Court, a new Trial may be granted, even after a Trial at Bar.

2*dly*, For that the *Venire* was wrong awarded, being *de vicineto de Bewdley*, whereas by the 4th and 5th of Queen *Anne*, *cap*. 16. for the Amendment of the Law, it ought to have been *de corpore Comitatûs*.

The Court, after Advice with the Juſtices of *C. B.* and Barons of the Exchequer, gave their Opinion upon the firſt Point the ſame Term; and the Lord Chief Juſtice delivered it as the Opinion of all the Judges of *England*, (except *Powell*) That when the Defendant's Counſel pray a ſpecial Verdict, and the Court direct the Jury to find one, if the Jury will take upon them to go contrary to that Direction, and find Matter of Law, it is a ſufficient Ground for a new Trial, even after a Trial at Bar.

For that it would be very unreaſonable, that in Caſes where the Court and the Jury are *both* of Opinion againſt the Party, there he ſhould have a Remedy by a Bill of Exceptions; but that in Caſes where the Jury *only* are of Opinion againſt him, and the Court doubtful, he ſhould be abſolutely concluded, and without Remedy, as he muſt be in this Caſe.

Powell J. *contra:* I do not very well know upon what Foundation of Law new Trials have been granted; but I found the Courts in Poſſeſſion of ſuch a Practice as to Trials by *Niſi prius*; but I do not know that this Practice has been eſtabliſhed as to Trials at Bar. Indeed I do remember two in the Exchequer in my Time, but I was always of Opinion againſt them, and that for theſe Reaſons, becauſe one is a Trial at Common Law, and the other by ſpecial Commiſſion only; and becauſe Trials at Bar are much more ſolemn, and attended with much greater Charge to the Parties, than the other.

I do not think any Thing ought to be a Ground for a new Trial, after a Trial at Bar, but what would make the Jury liable to an Attaint.

Chief Juſtice: The firſt Caſe of a new Trial, which we find in the Books, is that of *Wood* and *Gunſton*, in *Styles* 462, 466. and that was after a Trial at Bar.

The Practice of the Courts is the Law in theſe Caſes; and ſo of Ejectments and Rules for paying Money into Court, which have no other Foundation.

In the Caſe of *Briſtol* verſus *Cooper*, a ſpecial Verdict was prayed and directed, and the Jury found generally; whereupon a new Trial was granted for that Reaſon.

Dowman's Caſe in the 9 *Rep.* is very obſervable, about the ſeveral Duties of Judges and Jurors in this Particular.

In moſt Caſes, even where new Trials, after Trials at Bar, have been denied, the Judges have aſſerted the general Right, and one Reaſon why we do not find this Practice more ancient, may be, that there are no old Reports of Motions.

Eyre J. I do not find the Reaſons for new Trials confined to Miſdemeanors for which the Jury may be fined; the Caſe of *Wood* and *Gunſton* was not ſo.

But if a new Trial ſhall be granted in a Caſe where the Jury have done wrong, in a Matter which is properly under their Cogniſance, I cannot ſee any Reaſon why it may not be done in Caſes where they take upon them to determine Matters not within their Cogniſance. *Vide* 1 *Sid.* 153.

The Counſel for the Queen inſiſted, that this Verdict being ſet aſide for a Miſbehaviour of the Jury, and not any Fault in the Proſecutor, Coſts ought to be allowed.

But the Court ſaid, there was no need of entring into that Queſtion, till the Matter of the *Venire* was determined; and adjourned the Conſideration of that till the *Michaelmas* Term following, for the Advice of the other Judges.

Accordingly in *Michaelmas* Term (4 *Nov.*) this Point was argued before all the Judges of *England* at *Serjeants-Inn* in *Fleet-ſtreet.*

Serjeant *Pratt pro Def':* By the Statute of the 4th and 5th of her preſent Majeſty for the Amendment of the Law, this *Venire* ought to have been awarded *de corpore comitatûs.*

This is a Caſe within the expreſs Words and Intention of the Act; the Words are, " That from and

" after the firſt Day of *Trinity* Term, every *Venire facias* in any Action or Suit in any of the Courts at " *Weſtminſter*, ſhall be awarded of the Body of the proper County" ; and this is a Suit in the Court of Chancery in Order to repeal the Letters Patent of the 7th of the preſent Queen.

Neither is it leſs within the Intention and Miſchief deſigned to be prevented, as appears moſt plainly from the Preamble, which recites, " That whereas great " Delays do frequently happen, by Reaſon of Challenges to the Array of Panels of Jurors, and to the " Polls, for Default of Hundredors, for Prevention " thereof, *&c.*" Now this is a Proceeding to which that Miſchief extended ; for at the Trial there might have been a Challenge to the Array, for want of Hundredors.

That there may be ſuch a Challenge in the Caſe of the Crown, is what cannot, I think, be denied ; for if the Sheriff be commanded to return a Jury *de vicineto*, and there is not any Hundredor upon the Panel, he has not obeyed the Command of the Writ, and the Challenge is for his Default.

3 *Keb.* 740. In an Information for Perjury, a Motion was made, that the Defendant might not challenge for want of Hundredors, and it was denied ; becauſe the Subject would thereby be ouſted of a Privilege to which he is intitled by Law.

The Statute of 23 *H.* 8. *cap.* 13. enacts, That in Trials for Murder, in Corporations, there ſhall be no Challenge for Want of Freeholders ; by which it appears, that there might be ſuch a Challenge at Common Law, in the Caſe of the Crown ; and certainly where Freeholders are neceſſary, Hundredors are equally ſo.

This Act being made for the Advancement of Juſtice, it ought to have the moſt beneficial and extenſive Conſtruction imaginable; but to ſay, that the Crown ſhall not have a Jury *de corpore comitatûs*, is to deprive it of the Benefit and Advantage of an Act of Parliament.

It is true, that, genarally, the Crown ſhall not be ouſted of its Prerogative by an Act of Parliament, unleſs it be expreſly mentioned; but that Rule cannot affect this Caſe, for here the Crown had no Prerogative: It was liable to the Inconveniences recited in the Preamble, as well as the Subject, and then ſurely it ought not to be debarred of a Share in the Remedy.

The Intention of this Act may be further collected from the next Clauſe, which plainly proves, that the Law-makers took it to extend to Caſes of the Crown; for it expreſly excepts all Appeals, Indictments and Proſecutions on Penal Statutes, and what Occaſion could there have been for that Exception, if the former Clauſe had not taken in any Crown Caſes at all?

But, I think, it deſerves to be conſidered, whether this Proſecution be properly a Suit of the Crown or not? It ſeems to be no more than a Contention between two Corporations, whether the Letters Patent granted to one Side, or thoſe granted to the other, ſhall prevail? Both are contending for a Royal Charter, and the Crown is perfectly indifferent who obtains it; the Judgment in this Caſe will be only for the Benefit of the Party, for here can be no Judgment of Puniſhment for the Uſurpation, as in Informations in the Nature of *Quo Warranto's*.

Sir *Peter King*: The Words of this Act are as general and comprehenſive as poſſible, " Every *Venire facias* for the Trial of any Iſſue, in any Action or " Suit".

That there might be Challenges both to the Array, and to the Polls, in the Caſe of the Crown appears from *Keilw.* 102. *a.* And this Statute is made for the Remedy of that Miſchief in all Caſes where it might poſſibly happen before, ſome few only being excepted by Name. But in the preſent Caſe, Mr. *Attorney General* is contending for the Crown, that it ſhall not have the Benefit of a very uſeful and advantageous Law; this is like a Man's Diſabling himſelf. *Lit. Sect.* 410.

I know no Inſtance in the Law, where the Crown is excluded out of general Statutes made for the Benefit and Advantage of Proſecutors. The Caſes, wherein the Crown is held not to be bound, are, where it would otherwiſe be debarred of a precedent Right or Prerogative; but in the Caſe at Bar, the Crown was before this Act in the ſame Condition with the Subject; and I hope it will appear, that this is not *Placitum Coronæ*, but at moſt a Civil Action brought in the Name of the Crown. See Sir *Oliver Butler*'s Caſe, 2 *Vent.* 344. 3 *Lev.* 220. In Mr. *Brewſter*'s (*a*) Caſe, *Holt* C. J. ſaid, this was a Writ of Right. (*a*) 6 Mod. 229.

Tho' taking it either Way, *viz.* as a Suit of the Crown, or of the Subject, this *Venire* is wrong, and if ſo, we are in the only Method to take Advantage of it: The Sheriff has done his Duty, and obeyed the Command of the Writ, and therefore we could not Challenge the Array, but come to the Court to quaſh it: Challenge is for the Default of the Sheriff, where the Writ is right, Quaſhing is for Error in the Writ it ſelf.

Mr. *Salkeld*: The great Objection in this Caſe is, that the Act of the 4 & 5 *Annæ* is a Statute of *Jeofails*, and that therefore this Caſe is not comprehended within it.

This Act of Parliament conſiſts of diſtinct Branches, which are ſeparate Laws; ſome of them are Statutes of *Jeofails*, and others Statutes alterative of the Common Law, and the Clauſe, upon which this Queſtion ariſes, is of the latter Sort.

Statutes of *Jeofails* concern ſuch Faults as would vitiate the Judgment, and make it erroneous, if given, and are to enable the Courts to amend ſuch Faults, or to overlook them, and to give Judgment notwithſtanding.

The Clauſe about *Venire's* is not of this Nature, but is an intire Alteration of the Law in this Particular, making that to be right now, which was wrong before, & *ſic vice verſâ*

Statutes of *Jeofails* make no Alteration in the Law, for the Errors they concern, continue ſo notwithſtanding, but only provide a Remedy, that they may not prejudice the Party.

The chief Reaſon why the Statutes of *Jeofails* have not been held to extend to the Crown is, that ſuch Words are uſed in them as always exclude the Crown, (*viz.*) Plaintiff and Defendant, Demandant and Tenant, &c. otherwiſe here.

So far as this is a Statute of *Jeofails*, the Crown is not comprehended within it, but ſo far as it is an Act of Alteration, the Crown is included.

Thus

Thus in the 36 *Ed.* 3. *cap.* 15. the firſt Clauſe changes the Courſe of pleading, and by that the King has been always held to be bound; but the ſecond Clauſe which provides, "That no Man ſhall be prejudiced for Want "of Form in Pleading, *&c.*" being a Law of *Jeofails*, has for that Reaſon been held not to extend to the Crown; ſo of 16 & 17 *Car.* 2. *cap.* 8.

Northey Attorney General *pro Reginâ*: The Practice of the Crown-Office ever ſince the making of this Act, in all Caſes of Informations, as well in thoſe not excepted, as in thoſe compriſed within the Exception, has been to award the *Venire de Vicineto*, and it was never controverted till now. And to this Purpoſe I would apply what I have heard my Lord *Hale* ſay on like Occaſions, "That Judges ought to have a great Regard "to Practice, when the Matter is not *res integra*; and "when Things have gone on in that Courſe a great "while, without being broke in upon."

As to what has been ſaid, that the Words of this Act extend to Caſes of the Crown, the 4 *H.* 6. *cap.* 3. has Words as general, (*viz.*) any Proceſs or Plea, and yet was never taken to extend to the Crown. The Clauſe in the Statute of (*a*) Frauds, whereby Executions are made to bind from the Delivery of the Writ to the Sheriff, has general Words, (*viz.*) every Writ of Execution, and yet the Crown is held not to be bound by them, notwithſtanding it had no Prerogative in the Caſe before. I wonder to hear this denied to be a Suit of the Crown, ſince the ſame being brought in the Name of the Crown, (tho' for the Benefit of the Party,) makes it the Suit of the Crown; as in *Quo Warranto's*, *&c.*

(*a*) 29 Car. c. cap. 3. ſect. 16.

In a late Caſe of a *Quo Warranto* of a Claim of Fiſhery in ſeveral Vills, the *Venire* was awarded from one only, and held well enough, becauſe tried by a Jury of the proper County; ſo in the Caſe at Bar.

If the Reſolution in this Caſe ſhould be contrary to the received Practice, it would ſhake all the Judgments that have been given upon Informations ſince the making of this Act.

Raymond Solicitor General: The Words in ſeveral other Clauſes in this Statute are as general as in this, and yet the Crown has been held not to be comprehended within them; for Inſtance, that about Demurrers, and that about pleading double; *Regina* verſus *Foley*, a Motion was made for Liberty to plead double, and denied, becauſe not within the Clauſe.

The Words in ſome of the former Statutes of *Jeofails* are as large and comprehenſive as here; however, they have not been held to extend to the Crown: Nay, it appears to have been the Opinion of the Makers of this Act, that neither thoſe Statutes, nor this of the 4th and 5th of her preſent Majeſty, could take in Crown Caſes; for they have added a Clauſe at the End, to extend this and all the Statutes of *Jeofails* to Suits for the Recovery of Debts owing to the *Revenue*, which had been ſuperfluous, if the former Clauſes had been ſufficient.

But if this Caſe be held to be within the 4 & 5 *Anna*, I hope the ſame Reaſon will bring it within other Acts of *Jeofails* which contain Words as general and comprehenſive, and then it will be helped by 16 & 17 *Car*. 2. *cap*. 8. the Cauſe being tried by a Jury of the proper County.

Mr. *Lutwyche*: It is conſiderable, in this Caſe, who is the Perſon that takes the Exception to this Proceſs, and how he is prejudiced by it? why truly the Defendant comes and complains, that he has had a greater Advantage put in his Power than he ſhould have had; that he has had a Liberty of challenging given him, which, by Law, he ought not to have had.

The principal Reaſon why the Statutes of *Jeofails* have not been taken to extend to the Crown, is, becauſe it is not expreſly named; and this Reaſon holds in the Act of the 4th and 5th of her preſent Majeſty. See the 8th of *H. 6.* and alſo the late Caſe of the *Queen* verſus *Tutchin* (*a*).

(*a*) Mich. 3 Annæ.

In *Cro. Car.* 311. the *Venire facias* was awarded from the Town, whereas it ought to have been from the Manor; and held ill in a *Quo Warranto*; and that the Statute of 21 *Jac.* 1. did not extend to it; notwithſtanding that had an Exception of ſome other Crown Caſes, as in this Act.

The Clauſe about pleading double is general, and uſes the Word [Defendant] which is proper for all Suits, and yet held not to extend to the Crown.

It is no Objection to ſay, that this is a Suit for the Benefit of the Party; for ſo are Informations in the Nature of a *Quo Warranto*; but that this is properly a Suit of the Crown, appears, in that the Attorney General replies, and the Proceedings are in the Crown-Office; for, if it were not *Placitum Coronæ*, it ſhould have come on the Civil Side.

But if this Act be taken to extend to the Caſe at Bar, there can be no Reaſon why it ſhould not likewiſe be within the 16 & 17 *Car.* 2. and it will be no Objection to ſay, that this ariſes upon a ſubſequent Act, for that Statute has always received a very large Conſtruction, and been extended even to (*a*) local Actions tried in wrong Counties.

(*a*) Sed *Quære.*

Serj. *Pratt* in his Reply for the Defendants: *Regina* verſus *Foley*, was an Information in the Nature of a *Quo Warranto*, which is a criminal Proceeding, and beſides, the Reſolution was upon the Clauſe about pleading double, which is not general; for though it uſes the Word [Defendant] which is a general Term, yet it is reſtrained there by other Words, (*viz.*) Tenant and Plaintiff in Replevin.

The Caſe of *Tutchin* was upon a meer Statute of *Jeofails*; this is an intire Alteration of the Law.

The Clauſe, which extends this, and all the Statutes of *Jeofails*, to Caſes of the Crown, mentions only Suits for the Recovery of any Debt, and therefore cannot affect the preſent Queſtion; and certainly if there be no Proviſion for that Purpoſe, it is impoſſible that thoſe other Statutes ſhould extend to this Caſe, becauſe it ariſes upon a ſubſequent Statute which has made a perfect Alteration of the Law in this Point.

Sir *Peter King*: As to Pleading double, ſee *Poph.* 144. The Words of the Statute of Frauds cannot poſſibly extend to the Crown; for they are, "every Writ of "*Fieri facias*, or other Writ of Execution", and *Fieri facias* being firſt named, the Subſequent Words can only mean Executions at the Suit of the Party.

Mr. *Salkeld*: The 8th *Hen.* 6. *cap.* 12. is grafted on the former Statute of *Hen.* 5. and expreſsly tied down to it, ſo that no general Words can carry it any further.

Nothing can be inferred from any Reſolution upon the preceding Clauſes of this Statute; for the very Words of Them exclude the Crown, (*viz.*) 1*ſt*, Party demurring, 2*dly*, Plaintiff or Demandant appearing by Warrant of Attorney. 3*dly*, Defendant or Tenant, or Plaintiff in Replevin.

After Conſideration, all the Juſtices and Barons were unanimous, and the Lord Chief Juſtice delivered their Opinion in Court the ſame Term.

Parker C. J. We are all of Opinion, though this Clauſe might have extended to Cauſes of the Crown, had the Objection come earlier, yet the conſtant Practice, ever ſince the making of the Act, having been otherwiſe, and all the Precedents both in the Crown-Office, and in the Exchequer, (in Caſes not expreſly excepted) being *de Vicineto*; to make a contrary Reſolution in this Caſe, would be, in ſome Meaſure, to overturn the Juſtice of the Nation for ſeveral Years paſt; beſides, we conſidered that it is Matter of no great Conſequence; ſince it only gives the Defendant a Privilege of Challenge, which otherwiſe he would not have.

In Proſecutions of the Crown, though ſince the late Statute of the 4th and 5th of Queen *Anne*, the *Venire Facias*, which was awarded *de Vicineto*, and not *de Corpore Com'*, held good.

It is a Rule, indeed, that Precedents *ſub Silentio* are of little or no Authority: But that is to be underſtood of Caſes where there are judicial Precedents to the contrary. But here there are none either on one Side or the other.

The Chief Baron mentioned a Caſe in the Exchequer, which I remember: It was an Information about the Draw-back upon Salt, and there (as alſo in ſome others both here, and in that Court) all the Exceptions were taken that the Wit of Man could invent, but this was not ſo much as mentioned.

We did not think fit to break in upon an intire Practice, and ſhake ſo many Judgments upon a Matter of ſo ſmall Moment; and therefore are all of Opinion, that the *Venire* is well awarded.

The Rule muſt be, that the laſt Trial be ſet aſide upon the other Point, on Payment of Coſts.

About three Days after this Rule for a new Trial was pronounced; the Defendants moved, that ſome Perſon might be named to receive the Coſts, it not appearing certainly, who was the Proſecutor in this Cauſe.

Whereupon, Mr. Attorney General named *Borret*, the Queen's Solicitor, and acquainted the Court, that the Proſecution was carried on at the proper Expence of the Crown.

Afterwards the Solicitors on both Sides went before the Maſter, and the Coſts were taxed on *Saturday* the 22d of *November*. And on the *Tueſday* following, Mr. *Lechmere* made a Motion, upon Notice, againſt the Taxation of Coſts in General, and againſt ſome *Items* allowed by the Maſter in particular.

The Defendant ſhall pay Coſts for a new Trial on a *Scire Facias* being brought by the Crown to repeal a Charter.

He inſiſted, that though they had ſubmitted to a Rule for the Payment of Coſts, when the Cauſe appeared, even upon the Plaintiff's own ſhewing, to be merely a Contention between the Old and New Corporations, upon the Validity of their ſeveral Charters; yet now it appeared in another Light, and was owned by the Attorney General as a Government Proſecution, carried on at the Charge of the Crown, they ought not to be eſtopp'd by that Rule, from making it a Queſtion, whether in the Caſe of the Crown, Coſts are due by Law, this being the firſt Time they took Advantage of that Point. *Quod fuit Conceſſ' per Curiam.*

To prove that in Caſes of the Crown, or ſuch as are properly Government Proſecutions, Coſts are not due, he urged the Courſe of the Exchequer, where Coſts are never paid, unleſs there be a Relator, or ſome other Security to anſwer Coſts to the Party; which there was not in this Caſe, nor could there be, becauſe the Proſecution was *in Rem*, and not *in Perſonam*; and for that he produced a Manuſcript of Baron *Lechmere.*

That on the Crown Side in this Court, Coſts had been ſo far from being allowed in any Caſe, that it had been thought neceſſary to provide by (*a*) Act of Parliament, that there ſhould be a Recognizance given to anſwer Coſts in ſome particular Caſes; but this was none of thoſe; that the Law had provided no Judgment, nor Proceſs for Coſts, nor Method to bring Them into the Exchequer.

(*a*) *Vide* 4th and 5th of *Gul'* and *Mar'*, cap. 18.

That if it were otherwiſe, it would be very unequal; for the Queen paid no Coſts for not going on to Trial; nay, Mr. Attorney might enter a *Noli proſequi*, or a *Ceſſet proceſſus*, even when the Jury were ready to give their Verdict at the Bar, without Coſts to the Subject.

In the Caſe of *The Queen* verſus *Collins* (*Michaelmas* 10 *Annæ*) in an Information for a Battery upon a Cuſtom-Houſe Officer in the Execution of his Office, a Motion was made for Coſts for not going on to Trial; and upon Mr. *Harcourt*'s Affirmation, that no Coſts were ever allowed in Government Proſecutions, the ſame was denied.

That in the Caſe of *The Queen* verſus *Clerk*, which was an Information for a Nuſance, (*viz.*) for erecting Copper Mills upon the River *Thames*, there was a Verdict for the Queen, which by Conſent was ſet aſide upon Payment of Coſts; the Second Verdict was for the Defendant, who thereupon moved for Coſts, which were denied for this Reaſon, (*ſcil'*) becauſe the Statute of the 24th of *Hen.* 8. *cap.* 8. extends only to Trials by *Niſi prius*, and not at the Bar, as it was in that Caſe.

So in *Hill.* 3 *W. & M.* in *Scacc'* in my Lord *Montgomery*'s Caſe, which was an Inquiſition on his Eſtate, and but in the Nature of an Ejectment, there was a Verdict for the Defendant, and a new Trial granted without Coſts.

That here was no Prerogative in the Caſe; for the Queen and Subject were on an equal Foot; and if the Queen did not pay Coſts, ſhe ought to receive none.

That this Verdict was ſet aſide as unjuſt, for a Miſbehaviour of the Jury in the Face of her Majeſty, who was ſuppoſed to be always preſent in her Court of Queen's Bench, which Court ſaw plainly, no juſt Judgment could be entered up on that Verdict, and yet the Defendants were told, that this Injuſtice muſt be faſtened upon Them, unleſs they paid two or three hundred Pounds, to be delivered from it; ſurely this was to pay for Juſtice, contrary to *Magna Charta*, which ſays, *nulli vendemus juſtitiam.*

That in Capital Caſes, if a Jury ſhould obſtinately find *generally*, where the Court had directed

Them to find the Matter *ſpecially*, the Court, no Doubt, would ſet aſide ſuch Verdict, and that without Coſts; they would not take away the Life of a Man, becauſe he had not Money to pay Coſts to the Crown.

Now the Conſequence of this Suit was of equal Concern to this Corporation, as that of a capital Proſecution, to the Life of a particular Perſon; for the very Life and Being of this Corporation were in Queſtion; and if Coſts were once admitted in the Caſe, thoſe Writs of *Scire Facias*, though they had not yet ſo harſh a Sound in the Ears of *Engliſhmen*, yet, he would undertake to prove, they would have ten Times more pernicious Effects than *Quo Warranto's* of old; for a Judgment in a *Quo Warranto* did not deſtroy the Franchiſe, but a Corporation might ſtill, notwithſtanding that, have another Struggle for it's Liberty; but in the Caſe of a *Scire Facias*, the Judgment was a Repeal of the Charter; and if a Jury could for once be ſo managed, as to give a partial Verdict, it was but getting thoſe Coſts taxed as a poor Borough was not able to pay, and the Buſineſs would be done; they could not pay the Coſts, and without that, they ſhould not have a new Trial in order to come at Right and Juſtice.— This was *laying the Ax to the Root of the Tree.*—— The Crown indeed was always an unequal Match for the Subjects; but if the Weight of Coſts were thrown into the Scale, this would become ſuch an Addition, as would make its Proſecutions (*a*) heavier than they would be able to bear.

(*a*) By the Records in the Crown Office it appears, that the Defendants were, notwithſtanding, ordered to pay Coſts, and that afterwards on a new Trial the Jury found a ſpecial Verdict, but this does not appear to have been ever argued.

DE

Term. S. Trinitatis,

1713.

Caſe 49. **Car verſus Counteſs of Burlington.**

Lord Chancellor Harcourt.

A Truſt Term is raiſed to pay all Debts equally, and the Party dies indebted by Bond and Simple Contract, the Bond-Creditors may be paid Part of their Debts out of the Perſonal Eſtate, and ſhall nevertheleſs come in upon the Truſt Term for the Remainder, equally with the Simple Contract Debts.

RICHARD late Earl of *Burlington*, owing Debts by Bond and Simple Contract, made a Leaſe of his Lands in *England* and *Ireland* to Truſtees, in Truſt to pay all the Debts which he ſhould owe at his Death. All to be paid in a juſt Proportion without Preference of one Debt before another, and died thus indebted.

The Bond-Creditors had been paid good Part of their Debts out of the Earl's Perſonal Eſtate by his Executors.

Upon which it was now objected, that if theſe Bond-Creditors would take Advantage of the Truſt Term, they ought to wave the Benefit of their Preference out of the Perſonal Eſtate; that this was the Intent of the Teſtator, who could let them into the Benefit of the Truſt Term, upon what (*a*) Conditions he pleaſed; and that in Equity, a Simple-Contract Debt was as much a Debt, and due in Conſcience, as any other; that equal Payments of all Debts were favoured in Equity, Equality being the higheſt Equity.

But by Lord Chancellor *Harcourt*, The Bond-Creditors may ſtill come in to be paid the Remainder of their Debts, in Proportion with the Simple-Contract Creditors; for the Law gives them the Fund of the perſonal Eſtate, and the Party, (*viz.*) the late Earl, gives them the Fund of the Truſt-Term; and the Clauſe that no Debts ſhall have Preference, muſt be intended only with regard to their Satisfaction out of the Truſt-Term.

His Lordſhip alſo declared, that by this Truſt-Term the Simple-Contract Debts became as Debts due by Mortgage, and conſequently ſhould (*b*) carry Intereſt as well as the Debts ſecured by Bond.

When a Truſt is raiſed to pay Debts, Simple Contract Debts ſhall carry Intereſt.

Darbiſon, on the Demiſe of Long, verſus *Beaumont*. On a ſpecial Verdict in Ejectment, *in Scacc'*.

Caſe 50.

JOHN Specot, ſeiſed in Fee of the Manor of *Penheal* and divers other Lands, *&c.* in the Counties of *Cornwall* and *Devon*, 19 *Aug.* 1703. makes his Will, and after deviſing the Premiſſes to Truſtees for the Term of twenty-one Years, for the Payment of Debts, *&c.* he ſettles the ſame on the firſt Son of his (the Teſtator's)

Deviſe to the Heirs Male of *J. S.* begotten, *J. S.* having a Son, and the Teſtator taking Notice that *J. S.* was then living, a ſufficient Deſcription of the Teſtator's Meaning; and ſuch Son ſhall take, tho', ſtrictly ſpeaking, he be not Heir.

(*a*) Vide poſt the Caſe of *Deg* verſus *Deg contra*, 2 Vol. 412. Tho' in that Caſe the Deviſe was of all the real as well as perſonal Eſtate to pay Debts; which ſeemed to ſhew, that the Teſtator intended to make all but one intire Fund.

(*b*) Vide poſt *Maxwell* verſus *Wettenhall*, 2 Vol. 27.

tor's) Body lawfully begotten, and the Heirs Male of the Body of ſuch firſt Son lawfully iſſuing; and for Default of ſuch Iſſue, to the Heirs of his (the Teſtator's) Body lawfully to be begotten; and for Default of ſuch Iſſue, to his Couſin *John Sparke* for 99 Years, if he ſhould ſo long live, Remainder to his firſt, *&c.* Son in Tail Male; and in Default of ſuch Iſſue, Remainder to the Heirs Male of the Body of the Teſtator's Aunt *Elizabeth Long* lawfully begotten; and for Default of ſuch Iſſue, Remainder of all his Lands to his (the Teſtator's) right Heirs.

The ſaid Teſtator alſo gives a Legacy to his ſaid Aunt *Elizabeth Long*, whereby he takes Notice that *ſhe was living*, and that ſhe had three Sons *A. B.* and *C.* to whom he gives a Legacy of 500 *l.*

He alſo gives to *Dorothy Beaumont* (who was his Heir at Law) an Annuity out of the ſaid Premiſſes of 150 *l. per Annum*, and to her Children 500 *l.* a-piece.

Afterwards the Teſtator died without Iſſue, and *John Sparke* alſo died without Iſſue; upon which the Queſtion was, who was intitled to the Teſtator's real Eſtate? Whether his Heir at Law *Dorothy Beaumont*, or *A.* the eldeſt Son of the Teſtator's Aunt *Elizabeth Long*?

For the Heir at Law it was objected, that her Right was in its Nature favourable, and to be ſupported by the Common Law of *England*, and therefore all Deviſes that diſinherited the Heir were to be conſtrued ſtrictly. That to make this Deviſe good to *A.* it muſt be conſtrued either a contingent Remainder, or the Words [Heirs Male] be taken as *deſcriptio perſonæ*, ſo as to veſt a Remainder in him. That as a contingent Remainder it could not be good, becauſe there was no Freehold to

ſupport

ſupport it; all the precedent Eſtates being for Years; and if it were good as a contingent Remainder in its original Creation, yet *Eliz. Long* being *living* at the Teſtator's Death, ſuch Remainder could not by the Rule of Law veſt, as it ought to have done, at the Determination of the particular Eſtate; that Heirs Male of the Body of the Teſtator's Aunt *Long*, could not be underſtood by way of *Deſignatio*, or *Deſcriptio perſonæ*; for *that* is ſuch a Deſcription as is *vice nominis*; whereas the Word [Heirs] did not agree with the Perſon pretended to be deſcribed; he was not Heir of *Elizabeth Long*, nor could be, while ſhe was living; and [Heirs] being a legal Term, could be underſtood only in a legal Senſe, unleſs ſome other Word or Words accompanying it, ſhould determine the Senſe otherwiſe, as Heir *apparent*, or Heir *now living*; and the Word [begotten] did not determine the Senſe otherwiſe, becauſe Heirs *begotten* (*a*) or *to be begotten* had the ſame legal Conſtruction; and it did not appear that the Deviſor had any Intention to confine that Deviſe to the Iſſue Male of *Elizabeth Long* then living, much leſs to *A.* only, who would take as the Heir deſcribed by this Deviſe.

(*a*) 1 Inſt. 20. b. 2 Vern. 545, 711. Preced. in Chanc. 491. Poſt in *Hewit* ver. *Ireland*, 427. and *Gore* verſus *Gore*, 2 Vol. 33.

But it was adjudged by the whole Court of Exchequer, (except Baron *Bury*,) that *A.* the eldeſt Son of the Teſtator's Aunt *Elizabeth Long* was intitled to the Premiſſes, and not the Heir at Law; which Judgment was afterwards reverſed by the Opinion of the two Chief Juſtices in the Exchequer-Chamber; and that Reverſal at laſt * reverſed in the Houſe of Peers; and the Reaſons, upon which the Court of Exchequer gave Judgment, and upon which (as it was apprehended) the Houſe of Lords affirmed that Judgment, were theſe:

*May 1717.

That *A.* the eldeſt Son of *Elizabeth Long*, was the Perſon deſigned to take by the Appellation of the Heir

Male of the Body of the Teſtator's Aunt *Elizabeth Long* lawfully begotten.

As to the Objection that Mrs. *Long* being living, there could not, in a legal Senſe, be any Heir Male of her Body begotten to take by the Will:

It was anſwered, that the Intent of the Teſtator by the Deviſe (which was the only Matter in Queſtion,) did plainly appear, not only from the Words of *that* Part of the Will, but throughout the whole Will.

That the Word [Heir] had in Law ſeveral Significations: In the ſtricteſt, it ſignified one who had ſucceeded to a dead Anceſtor; but in a more general Senſe, it ſignified an Heir apparent, which ſuppoſed the Anceſtor to be living.

That in this laſt Senſe the Word [Heir] was (*a*) uſed in Statutes, Law-Books and Records; and ſince the Law had given to this Word ſeveral Senſes, it would be hard to expound it in that which was the ſtricteſt, and moſt rigorous, and would deſtroy great Part of the Will; at the ſame Time, that by Law it might have another Senſe, which would ſupport the whole Will and Intent of the Party.

That the Intent of the Party being the principal Rule for the Expoſition of a Will, the Teſtator was excuſed from uſing the ſtrict and proper Terms and Phraſes of Law, and had Liberty to uſe ſuch Expreſſions as he pleaſed; for, provided they were ſuch as ſufficiently declared his Intent, it was enough; and his Intent ſhould take place, if by any Poſſibility conſiſtent with Rules of Law.

(*a*) See the Writ of Raviſhment of Ward *Quare filium & hæredem rapuit*, and 2 *Inſt*. 439. and 25 *Ed*. 3. which makes it Treaſon to kill the *Heir* of the King.

Now the Teſtator in his Will took Notice, that the Sons of his Aunt *Eliz. Long* were living, and gave them Legacies:

He alſo took Notice that *Eliz. Long* the Anceſtor was living at that Time, and gave her a Legacy; and therefore could not intend that the firſt Son ſhould take *ſtrictly as* Heir, which was impoſſible if ſhe was living, but as Heir *apparent* he might.

Again, the Teſtator gave his Heir, the Defendant, an Annuity, and therefore did not intend that he ſhould have the whole Eſtate; and the Limitation to the right Heirs was expreſly in Failure of Iſſue Male of his Aunt *Eliz. Long*, ſo that the Intent was plain, that the apparent Heir Male of the Body of his Aunt *Long*, (who was the Leſſor of the Plaintiff,) ſhould take before his Heir general, who was the Defendant *Dorothy*; and that ſhe ſhould not take more than an Annuity, as long as there ſhould be Iſſue Male of his ſaid Aunt *Elizabeth Long*.

That by this Conſtruction, every Part of the Will would ſtand and be conſiſtent; and the Word [Heir] would be alſo taken in a Senſe that the Law allowed of.

But if it were to be conſtrued otherwiſe, ſeveral Parts, and ſome whole Lines together, of a ſenſible Will muſt be expunged, and the Heir at Law muſt take, contrary to the expreſs Meaning of the Teſtator.

Laſtly, That this Caſe was the ſame with the Caſe of *Burchett* verſus *Durdant* (*a*), which had formerly been diſputed under the Names of *James* verſus *Richardſon* (*b*), where a Deviſe to the Heirs Male of the Body of *Robert Durdant then living*, was adjudged in

(*a*) 2 Vent. 311.

(*b*) 1 Vent. 334. 2 Lev. 232. Raym. 330. T. Jones 99. Poll. 457.

Weſtminſter-Hall, and twice affirmed in the Houſe of Lords, to be a good Limitation to *George* the eldeſt Son of *Robert Durdant*, tho' *Robert Durdant* was then living; ſince there could be no great Difference between Heirs Male of the Body of *Robert Durdant* then living, and Heirs Male of the Body of the Teſtator's Aunt *Long* lawfully begotten; the Words *then begotten* being tantamount to *then living*.

Caſe 51.

Lord Chancellor Harcourt.

Kentiſh verſus *Newman*.

Articles conſtrued againſt the Words for the Sake of the Intent. As where the Wife's Portion was to be laid out in Land to be ſettled on Husband and Wife, and the Heirs of their Bodies; and if not laid out in Land during their joint Lives, and the Wife ſhould die firſt, that the Money ſhould go to the Wife's Brother and Siſter: Wife dies firſt, leaving Iſſue, and the Money is not laid out in a Purchaſe, yet the Iſſue, and not the Wife's Brother and Siſter, ſhall have it; Equity ſupplying the Words, *if the Wife die without Iſſue*.

HENRY *Kentiſh* intermarries with *Mary Hanwell* Widow, who (*inter al'*) is poſſeſſed of 200 *l.* put out on Securities, and the Huſband, before the Marriage, articles to lay out ſo much Money of his own, as with the Wife's 200 *l.* ſhould purchaſe 30 *l.* a Year; and this to be ſettled on himſelf and his Wife for their Lives, Remainder to the Heirs of their Bodies, Remainder to the Husband in Fee; but until ſuch Settlement made, this 200 *l.* is agreed to be taken as the ſeparate Eſtate of the Wife; it is alſo agreed by the ſaid Articles, that if no ſuch Settlement ſhall be made during the joint Lives of the Huſband and Wife, then the 200 *l.* ſhall be to the ſole Uſe of the Wife, if living, but if ſhe ſhall die before her Huſband, then the 200 *l.* to go to her Brother and Siſter.

In 1688. the Marriage takes Effect, of which there was Iſſue a Daughter the Plaintiff; and in *September* 1711. the Wife dies, leaving no other Iſſue.

And whether, according to the Letter of the Articles, this 200 *l.* ſhould go to the *Wife's Brother and Siſter*, or to the *Daughter*, (to whom the Father by his Anſwer conſented it ſhould go in preſent for her Advancement in Marriage,) was the Queſtion?

Decreed, that the Daughter ſhould have this 200 *l.* and not the Wife's Brother and Siſter; for that the Intention of the Articles was, to provide for the Wife, and the Iſſue of the Marriage, and not for the Brother and Siſter of the Wife; and for that the Parents were, by the Law of Nature, bound to take Care of the Iſſue, but not of the Wife's Brother and Siſter, who were provided for before, and for whom, tho' they had been left deſtitute, ſtill the Wife was under no Obligation to provide.

That it could not be intended that the Wife ever thought of preferring her Brother and Siſter before her own Child; and tho' the Words were, *if the Wife ſhould die, living the Husband, then the* 200 *l. to go to the Wife's Brother and Siſter,* yet muſt they be conſtrued to mean, if the Wife ſhould die *without Iſſue.*

That even in the Caſe of a Conveyance of a legal Eſtate, the Words [without Iſſue] had been ſupplied; thus in *Cro. Car.* 185. *Spalding* verſus *Spalding* (*a*), (the ſame Caſe cited in 1 *Vent.* 230.) Lands were deviſed to *A.* the Teſtator's eldeſt Son, and the Heirs of his Body, and if he died living his Mother, then to the Teſtator's ſecond Son; *A.* died living his Mother, and leaving Iſſue; in which Caſe,

(*a*) See this Caſe cited poſt, *Hewit* verſus *Ireland*, 427.

It was objected, that the ſecond Son ſhould take, and that theſe Words [if he died living his Mother] were corrective and explanatory of the firſt Words; but reſolved otherwiſe, and that the Court would ſupply the Words [without Iſſue]; for that it could not be intended, that the Teſtator would prefer the ſecond Son before the Iſſue of the eldeſt Son; ſo neither in this Caſe could it be thought, that the Wife would prefer her Brother and Siſter before her own Child.

That this being Matter of Articles was more under the Controul of a Court of Equity, than if it had been a veſted Eſtate; this was Truſt-Money, over which the Court had a Power.

Money to be laid out in Land was to be taken as Land; and tho' this Money was not inveſted in Land within the Time required by the Articles, yet the Court would diſpenſe with that; and if it had been inveſted in Land within the Time, then, by the expreſs Words of the Articles, it was to go to the Iſſue of the Marriage.

Beſides, in this Caſe, one of the Truſtees themſelves, (*viz.*) the Brother, (who was to take Advantage of not laying out the Money in a Purchaſe,) had declared, he would not claim Title to the Money, if it were not inveſted during the joint Lives of the Huſband and Wife; which Declaration might naturally be preſumed to have been the Reaſon why the Money was not laid out.

Truſtees not to take Advantage of their own Laches.

Alſo it was the Duty of the Truſtees to call upon the Huſband to lay out the Money and make the Purchaſe; inſtead of which, one of them, by declaring he would not take the Advantage of any Omiſſion of that Kind, had incouraged him to ſit ſtill; ſo that if ſuch Truſtee were to have the Money, he would reap a Benefit from his own Wrong.

Ex parte Smith. On Petition.

Caſe 52.

Lord Chancellor Harcourt.

A. lends Money to *B.* and *C.* on Bond, *B.* becomes Bankrupt, and his Eſtate aſſigned by Commiſſioners; *A.* ſues *C.* and takes him in Execution on a *Ca' Sa'*, and afterwards conſents to his Eſcape; yet *A.* ſhall come in as a Creditor of the Bankrupt for a Moiety of his remaining Debt.

A. Lends Money to *B.* and *C.* on their Bond, *B.* becomes a Bankrupt, and the Commiſſioners aſſign his Eſtate in Truſt for his Creditors:

A. ſues the Bond againſt *C.* the other Obligor, and recovering Judgment againſt him, takes him in Execution by *Ca' Sa'*, and *C.* thereupon paid *A.* 24 *l.* but *C.* being old, and having no Eſtate, and living only upon Charity, *A.* conſented to diſcharge *C.* out of Execution.

Upon which it was objected, that this being an Eſcape with the Conſent of the Plaintiff the Obligee, and the Debt being, in Law, *intire*, it was a Diſcharge of the *whole* Debt, and ſhould operate, as well for the Benefit of *B.* the Bankrupt, the other Obligor, as of *C.*

But it was anſwered, that the Bankrupcy of *B.* and the Aſſignment of his Eſtate, were prior to the Execution taken out againſt *C.* and by that Aſſignment *A.* the Plaintiff had an Intereſt in the Eſtate of *B.* the Bankrupt; which Intereſt could not be diſcharged, by *A.*'s taking out an Execution afterwards againſt *C.* the other Obligor, any more, than if two were bound in a Bond to me, and I ſhould recover Judgment, and take out an Execution by *Fi' Fa'* againſt one, and afterwards on obtaining a Judgment ſue out an Execution by *Ca' Sa'* againſt the other, and then conſent that the latter ſhall eſcape, this will not diſcharge the Execution on the *Fi' Fa'*, which was before compleated againſt the former Obligor; and that ſtill this was harder Doctrine in Equity.

Lord Chancellor: Let *A.* the Petitioner, who is the Obligee in the Bond, come in as a Creditor before the Aſſignees, for a Moiety of the remaining Money due on the Bond; for the Execution againſt *C.* being ſubſequent to the Aſſignment of the Eſtate of *B.* the Bankrupt, ſhall not (at leaſt in Equity) diſcharge *A.*'s Demand out of the Eſtate of the Bankrupt; but in regard, each, in Equity, was liable but to *Half* the Debt, and *C.* was not the original Debtor for the whole, *A.* the Petitioner ſhall only have Relief for a (*a*) *Moiety* of his remaining Debt againſt the Aſſignees of *B.* the Bankrupt.

But Lord Chancellor ſaid, if *B.* the Bankrupt had been the original Debtor, and had borrowed *all* the Money, then *A.* ſhould have come in before the Aſſignees as a Creditor for *all* his Debt.

(*a*) *Qu.* Why ſhould not the Petitioner, in this Caſe, be allowed to come in for the Remainder of his whole Debt out of the Effects of the Bankrupt, ſince each of the Obligors was liable to him for the whole?

I

DE

Term. S. Michaelis,

1713.

Broderick verſus *Broderick.*

Caſe 53.
Lord Chancellor Harcourt.

Deviſee under a Will defectively executed, repreſents the Will duly executed, and for a ſmall Sum gains a Releaſe from the Heir; Releaſe ſet aſide.

ONE Deviſes Lands to *J. S.* and his Heirs, and duly ſubſcribes his Will in the Preſence of three Witneſſes; but the Witneſſes, for the Eaſe of the Teſtator, go down Stairs into another Room, and atteſt the Will there, which is out of the Preſence of the Teſtator.

Afterwards the Heir at Law, in Conſideration of 100 Guineas paid him by *J. S.* the Deviſee, does by Deed, reciting that this Will was duly executed, releaſe to the Deviſee all his Right to the Eſtate deviſed; and after that, there being Debts appointed by the Will to be paid, the Deviſee tells the Heir, that it would facilitate the Raiſing the Money for the Payment of the Debts, if He (the Heir) would join in a Leaſe and Releaſe of the deviſed Premiſſes; and thereupon, for fifty Guineas more paid to him, he, (the Heir) together with the Deviſee, by Leaſe and Releaſe, conveyed the Premiſſes to *J. N.* and his Heirs, in Conſideration of 4000 *l.* mentioned to be paid by *J. N.* and a Receipt was given for the Money; but, in Truth, this Purchaſe Money was not paid, but *J. N.* was a Truſtee only for the Deviſee, and ſo admitted to be by the Anſwer.

On a Bill brought by the Heir to be relieved againſt the Conveyances executed by him,

For the Deviſee it was ſaid, that the Will, as to the Deviſor, was executed, and the Form of the Witneſſes ſubſcribing in the Preſence of the Teſtator, was only preſcribed by the Statute of Frauds, to prevent a raſh Diſinheriſon of the Heir; but ſince the executing of the Will was fully proved, though the Circumſtances required by the Statute had not been obſerved, yet it was the plain Intention of the Teſtator, that the Deviſee ſhould have the Eſtate; and the Deviſee having the legal Eſtate, it would be hard to take it from him in Equity, and by that Means to diſpoſe of the Eſtate againſt the Intent of the Teſtator, from the Deviſee, for want of a Ceremony, when the End of That Ceremony was anſwered, by it's being made to appear, undoubtedly, that the Teſtator did Sign and Seal this Will.

Suppreſſio veri, or *Suggeſtio falſi*, is, each of them, a good Reaſon to ſet aſide any Deed or Conveyance.

Cur': Either (*a*) *Suppreſſio veri*, or *Suggeſtio falſi*, is a good Reaſon to ſet aſide any Releaſe or Conveyance: Now to recite in a Deed (as in this Caſe) that the Will was duly executed, when it was not, is *Suggeſtio falſi*, and to conceal from the Heir (as in this Caſe) that the Will was not duly executed, is *Suppreſſio veri*; ſo that both Circumſtances concur.

And though there was one Witneſs, who, upon the laſt general Interrogatory, ſwore, that the Heir did declare to him, that the Will was not worth any

Thing

(*a*) *Vide* 1 *Vern.* 20. *Jervis* verſus *Duke*, alſo the latter Caſe of *Can* verſus *Can*, *poſt* 727.

Thing, and that the Heir made ſuch Declaration before his executing the Releaſe, yet this was not regarded.

For Lord Chancellor ſaid, it was not to be believed, that if the Heir knew that the Will was not duly executed, he would, for ſo ſmall a Conſideration, have parted with his Eſtate.

So the Court relieved againſt the Releaſe, and the Leaſe and Releaſe; but ordered the Heir to pay back the 100 Guineas, and alſo the 50 Guineas, with Intereſt.

Caſe 54. *Lord Chancellor* Harcourt. Salk. 318. Two Executors join in a Receipt, and only one of them actually receives the Money, both chargeable to Creditors, but not to Legatees. Two Truſtees join in a Receipt, and one receives the Money, only the Receiving Truſtee ſhall be charged.

Churchill verſus *Lady Hobſon & al'.*

SIR *Charles Hobſon* did in his Life-Time place great Sums of Money in the Hands of one *Goodwyn* a Banker, who at that Time, and for a conſiderable Time afterwards, was a Perſon of very great Credit, and was Caſhier to very many monied Perſons.

Sir *Charles* dies, and leaves the Plaintiff *Churchill* and *Goodwyn* Executors, after whoſe Death, *Goodwyn* continuing in the ſame Credit, the Plaintiff *Churchill* paid 500 *l.* of the Money of his Teſtator Sir *Charles* into *Goodwyn*'s Hands; and ſeveral of Sir *Charles*'s Creditors, on paying in their Debts, did require, that when they paid their Money to the Executor *Goodwyn*, his Co-Executor *Churchill ſhould join in the Receipt for this Money*, which accordingly was done. But upon the Plaintiff *Churchill*'s joining in the Receipt, *Goodwyn* did, on every ſuch Payment, give a Note to *Churchill*, by which it was acknowledged, that though the

Plaintiff *Churchill* had joined in the Receipt, yet it was He, *viz.* Goodwyn *only, who received the Money*, and the Money which *Goodwyn* thus received, and on Payment whereof *Churchill* joined in the Receipt, amounted to 1100 *l.* after which *Goodwyn* broke, and became Inſolvent.

The Bill was brought by *Churchill*, to be diſcharged of the Executorſhip, and to be indemnified againſt the Bankruptcy of *Goodwyn*.

Whereupon it was now objected by Mr. *Vernon*, that the Plaintiff *Churchill* having joined in the Receipts, this made him liable for the whole Money: He admitted, that in the Caſe of (*a*) *Fellowes* verſus *Owen*, where *A.* and *B.* were Truſtees in a Mortgage for 2000 *l.* and they both joined in a Receipt for the whole Money; (whereas in Fact, they had received each but 1000 *l.*) that though Lord Keeper *Wright* (*b*) had decreed each ſhould be liable for the whole, in Reſpect of the Receipt that had been given, yet Lord *Cowper* reverſed that Decree, conceiving it to be againſt natural Juſtice, that one ſhould be liable for the Receipt or Act of another; though this had been ſo decreed in the Caſe of two *Truſtees*, yet in the Caſe of *Executors* it was otherwiſe. Becauſe, as one Executor alone might give a Diſcharge, the joining of the Other was an unneceſſary Act; for which Reaſon if the Money were loſt, each ſhould be liable; that accordingly, it was thus held in the Caſe of *Wilkins* verſus *Allen*, and more particularly in that of *Murrel* verſus *Pit*, decreed, firſt, by Sir *John Trevor* at the Rolls, and affirmed afterwards on Appeal by Lord *Cowper*.

(*a*) Ante 81.

(*b*) It ſeems as if Lord Keeper *Wright* had only intimated an Opinion of that Kind, ſince it does not appear by the Regiſter-Book that he made any Decree in that Cauſe.

Sed per Lord Chancellor *Harcourt:* It ſeems to me unreaſonable, that one Man ſhould ſuffer for the Default of another; at leaſt the Difference ought to be between the Caſe of a Creditor and that of a Legatee. In the Caſe of Creditors, who are intitled to the utmoſt Benefit of the Law, the joining of the Executors in the Receipt, may make each liable for the Whole; but when Legatees, or ſuch as claim under the Statute of Diſtribution, are the only Perſons concerned, and who have no Remedy for their Demand but in Equity, it is altogether unequitable, that one Executor ſhould anſwer for the Receipt of the Other, the joining in the Receipt being but Matter of Form; whereas the ſubſtantial Part, and which alone is to be regarded in Conſcience, is the actual Receipt of the Money.

Neither do I think the Executor *Churchill* ought to be chargeable for the 500 *l.* by him paid to *Goodwyn*, he having been the Caſhier with whom the Teſtator in his Life-time choſe to intruſt his Money, and therefore the Executor ought not to ſuffer for having truſted him, whom the Teſtator himſelf in his Life truſted, and at his Death made one of his Executors.

DE

DE
Term. S. Hillarii,
1713.

Caſe 55.
Lord Chancellor Harcourt.
The eldeſt Daughter, where there is a Son, or where the Eſtate by a Settlement goes all to a Remainder-Man, is a younger Child in Equity.

Beale verſus *Beale*.

A. Was Tenant for Life, Remainder to his firſt, *&c.* Son in Tail Male, Remainder to his Brother *B.* in Tail. *A.* having no Iſſue, *A.* and *B.* joined in a Recovery, to the Uſe of *A.* for Life, Remainder to ſuch Woman as *A.* ſhould marry, for her Life, Remainder to the firſt, *&c.* Sons of *A.* in Tail Male, Remainder to *B.* the Brother in Tail Male, Remainder to *A.* in Fee;

With a Power to *A.* by Deed, or Will, to charge the Premiſſes with any Sum not exceeding 2000 *l.* for Portions for younger Children, Sons or Daughters, who ſhould be *living at his Death*, in ſuch Proportions as he ſhould think fit.

A. marries, and has Iſſue two Daughters only, one of whom was born *after his Death*.

A. by his Will charges the Premiſſes with 2000*l.* to his Daughter *Mary*, payable at twenty-one, or

Marriage; but if the Child, with which his Wife was then enſient, ſhould prove a Daughter, then he directs that the 2000 *l.* ſhould be equally divided betwixt them.

A. dies, and the two Daughters, being of very tender Years, bring their Bill for the raiſing of this 2000 *l.* out of the Reverſionary Eſtate, and to have Intereſt in the mean Time for their Maintenance.

Objected, The *elder* Daughter is not intitled to any Part of this 2000 *l.* becauſe ſhe was only to go to the *younger* Children; and the *younger* Daughter cannot claim any Part of it, becauſe ſhe was *not living at the Time of* A.*'s Death*, and by the Words of the Settlement, the 2000 *l.* was to go to the *younger* Children that *A.* ſhould have *living at his Death*.

Cur': The eldeſt Daughter, tho' firſt born, when there is a Son, has been often ruled to be as a younger Child (*a*).

Every one, but the Heir, is a younger Child in Equity, and the Proviſion which ſuch Daughter will have, is but as a younger Child's, in regard the Son goes away with the Land as Heir; ſo here, the Eſtate by the Settlement goes all to the Remainder-Man, who is *Hæres factus*, and neither of the two Daughters is Heir; wherefore the elder Daughter having no more than the Younger, is (as to this Proviſion) a younger Child, and conſequently capable of taking it.

Power to charge Lands for Portions for younger Children living at the Father's Death; a Child in *Ventre ſa Mere*, is a Child within the Power.

(*a*) Vide poſt, *Butler* verſus *Duncombe*, 451.

As to the other Objection, it would be very hard in a Court of Equity, that a Child, becauſe it happened not to be born at ſuch a Time, muſt, therefore, be unprovided for; but as the Law, in many Reſpects, regards an Infant in *Ventre ſa Mere*, ſo as to allow ſuch Child to be (*a*) vouched; alſo, as the Mother may be guilty of the Murder (*b*) of a Child in *Ventre ſa Mere*, if ſhe takes Poiſon, with an Intent to poiſon it, and the Child is born alive, and afterwards dies of that Poiſon: So there is more Reaſon that Equity ſhould conſider ſuch Child, in order to its being *provided for*; and therefore this Poſthumous Child may be well looked upon, in Equity, to be (*c*) *living at her Father's Death*, in *Ventre ſa Mere*.

(*a*) 1 Inſt. 390.

(*b*) 3 Inſt. 50, 51.

(*c*) Poſt 342. *Northey* verſus *Strange*. Vide alſo the Caſe of *Burdet* verſus *Hopegood*, poſt 487.

And with Regard to that Part of the Bill, which prayed to charge the Remainder only, with this 2000 *l.* Portion, the Court held, that the Power, and the Charge made purſuant thereto, did affect the Wife's Eſtate for Life, as well as the Remainder, and that it was like a Power of Leaſing, which over-reaches all the Eſtates; for which Reaſon it is uſual to inſert a Proviſo in ſuch Power of charging, that it ſhall not prejudice the Jointure, or other precedent Eſtates.

Where Lands are ſettled on *A.* for Life, Remainder to ſuch Woman as he ſhould marry, for Life, Remainder over, with Power to charge the Premiſſes with any Sum of Money, ſuch Power, unleſs there be a Clauſe inſerted to the contrary, will, like a Power of Leaſing, over-reach all the Eſtates.

DE

Term. S. Trinitatis,

1714.

Jenner verſus *Harper*.

Caſe 56.

Salk. 163. *Lord Chancellor* Harcourt.

Deviſe by Nuncupative Will, by Tenant in Tail, of Rent out of Land to a Charity, void, though the Will was made before the Statute of Frauds.

TENANT in Tail of the Manor of *Widhill* in *Berks*, made a Nuncupative Will, which was afterwards reduced into Writing; and by it he deviſed, that his Executors ſhould purchaſe a Parcel of Ground in *Cricklade* in *Wilts*, for the erecting of a Free-School there, and gave to the ſaid School 20 *l.* *per Annum* Rent, to be paid out of his ſaid Manor of *Widhill*, and died.

The Will was made, and the Party making the ſame died, before the Statute of Frauds and Perjuries; and the Will was proved in the Spiritual Court as a Nuncupative Will. In Purſuance of the Will the Executors bought the Ground in *Cricklade*, and built the School thereupon, and the Commiſſioners for charitable Uſes decreed the Iſſue in Tail of the Manor of *Widhill* to pay the Arrears of the 20 *l. per Annum* Rent to the School.

The Iſſue in Tail, upon this, except to the Decree, and the Exception coming on before Lord Chancellor *Harcourt*, it was inſiſted for the Decree, that though this was void, as a *Will*, yet it was good as an *Appointment*, by Virtue of the Statute of 43 *Eliz. cap.* 4. of Charitable Uſes; as if Tenant (*a*) in Tail had deviſed Land without having levied a Fine, or ſuffered a Recovery; or a Copyholder had deviſed his Copyhold to charitable Uſes, without ſurrendering it to the Uſe of his Will; ſuch Deviſes would be made effectual.

(*a*) 2 Vern. 453, 454.

Deviſe by Tenant in Tail to a Charity good, though no Fine levied, or Recovery ſuffered previous thereto.

But, after Time taken by Lord Chancellor to conſider of this Matter, his Lordſhip allowed the Exception, and reverſed the Commiſſioners Decree, foraſmuch as at Common Law, Lands, or a real Eſtate, were not deviſable; and by the Statute of 32 *H.* 8. it is as much required that a Will of Lands ſhould be in Writing, as by the Statute of Frauds and Perjuries, it is required that ſuch a Will ſhould have three Witneſſes; and as in *Johnſon*'s (*b*) Caſe decreed by the Lord Chancellor *Cowper*, a deviſe of Land in Writing to a Charity, ſince the Statute of Frauds, but not atteſted by the three Witneſſes, was held to be void; ſo a Deviſe of Land without Writing ſhould be void alſo, eſpecially, it being by Tenant in Tail, and of a Rent too, which cannot paſs but by Deed; and it would be very dangerous to allow of nuncupative Wills of Land.

(*b*) 2 Vern. 597. Preced. in Chan. 270.

Sed Quære, & vide Duke's Charitable Uſes 81. *Stoddard*'s Caſe, where one, before the Statute of Frauds, deviſed a Rent of 10 *l. per Annum*, out of Lands to a charitable Uſe, and willed that one *Hugh* the Scrivener ſhould put it into Writing, which was accordingly done, and decreed, that this Nuncupative

Will was good; for “ though a Rent cannot be *created* “ without Deed, yet by the Words of 43 *Eliz.* it may “ be *appointed* without Deed, and though the Nuncupative Will be void as a *Will*, it is good as an *Ap*“*pointment*”; and it ſeems that the Statute of 43 *Eliz.* which makes theſe Apointments to Charities good, being ſubſequent to the Statute of 32 *H.* 8. of Wills, ſuperſedes and repeals that Statute; but it is true, that the Statute of Frauds and Perjuries, being ſubſequent to the Statute of 43 *Eliz.* does repeal that Statute, and therefore, ſince the Statute of Frauds, *&c.* an Appointment of Lands to a Charity, by a Will not atteſted by three Witneſſes, is void.

Miles verſus *Williams & Ux'.*

Caſe 57.

Reſolution of the Court of *B. R.* that the Debts of the Wife, *dum ſola*, are diſcharged by the Bankruptcy of the Husband, and that Debts due to the Wife *dum ſola*, though unrecovered, are aſſignable by the Commiſſioners on the Husband's Bankruptcy, *per Stat.* 4 *Ann. cap.* 17. and that the Plea upon that Act muſt conclude to the Country.

MILES brought Debt *verſus* Baron and Feme, upon a Bond entered into by the Feme *dum ſola*. The Defendants jointly plead in Bar, *Quod querens action' non*, *&c.* and ſay, that after the Intermarriage, (*ſcil.*) *in Septemb. anno* 5 *Annæ*, *Williams* the Husband became a Bankrupt *infra intention' ſeparal' Statut' contra Decoctor' edit' & proviſ'*, and that a Commiſſion *ſupr' ſeparal' ſtatut' decoctor'* iſſued under the Great Seal, bearing Date *tali die*, and directed to *M. K.* and *T. A. &c.* afterwards, (*ſcil.*) *tali die*, the ſaid *Williams* voluntarily ſurrendered himſelf to the major Part of the Commiſſioners, and from Time to Time ſubmitted himſelf to be examined upon Oath by the ſaid Commiſſioners, *& in omnibus ſe conformavit ad ſtatut'* 4 *Annæ*, *intitulat*, An Act to prevent Frauds frequently committed by Bankrupts, *& ad omnia al' Statut' contra decoctor' edit'*, *& ſic idem* Johannes *&* Eleonora, *vigore ſtat' prædict' in prædict'* Parliament' *dict' Dom' Reginæ nunc edit'*, *dicunt*, *quod cauſa action' prædict' accrevit præfat'* Miles, *antequam idem* Johannes Williams *devenit decoctor*; *& hoc parat' ſunt verificare*; *unde pet' jud' ſi prædict'* Miles *action'*, *&c.*

The Plaintiff demurred, and ſhewed for Cauſe, that the Debt ariſing upon a Bond made by the Wife, *dum ſola*, was not diſcharged by the Statute mentioned in the Defendants Plea; and alſo that the Plea ought to have concluded to the Country.

The Defendants joined in Demurrer.

And after ſeveral Arguments in this Caſe, *Parker*, C. J. having ſtated the Record at large, delivered the Reſolution of the Court.

The two great Queſtions, which have been made in this Caſe, are theſe;

1*ſt*, Whether this, being a Debt on a Bond given by the Wife, *dum ſola*, be ſuch a Debt, as ſhall be diſcharged by the Bankruptcy of the Huſband by Virtue of the Statute of 4 *Annæ*, *cap.* 17. mentioned in the Plea?

2*dly*, Whether the Defendants have well concluded their Plea, or not, it being to the Judgment of the Court, and not to the Country?

As to the *firſt*, we are all of Opinion, that it is a Debt within the Act.

(*a*) Sect. 7. The Words of the Clauſe, upon which it depends, are, "(*a*) that the Bankrupt ſhall be diſcharged from all "Debts by him due and owing at the Time he became Bankrupt; and then, in Caſe he be ſued for "any ſuch Debt, the Act directs, that he ſhall and "may plead in general, that the Cauſe of Action "did accrue before he became Bankrupt."

Upon

Upon theſe Words, the immediate Queſtion is, whether this was a Debt due and owing by the Husband, at the Time he became Bankrupt?

It was ſaid, and (I think) admitted at the Bar, that a Debt due *by* the Wife, and one due *to* the Wife, *dum ſola,* muſt fall under the ſame Conſideration.

Debts due to the Wife conſidered.

This is very reaſonable, and therefore I have conſidered how far a Debt due to the Wife would be within this Act to be aſſigned by the Commiſſioners of Bankruptcy? and in order to underſtand this, it is neceſſary to go back to the former Acts.

13 *Eliz. cap.* 7. enacts, That the Commiſſioners ſhall take Order with the Bankrupt's Body, Lands and Tenements, (as well Freehold as Copyhold,) Goods, Chattels, Debts, *&c.* and ſell the ſame, *&c.*

Then comes the Statute of 1 *Jac.* 1. *cap.* 15. which, reciting that the Authority given to the Commiſſioners by the former Act was not full and perfect, for further Remedy, gives them (*a*) "Power to grant and aſſign all Debts due, or to be due to and for the Benefit of the Bankrupt, and the ſame to be recovered in the Name of the Aſſignees."

Intention of the Statutes againſt Bankrupts.

Now I take the Intention of theſe Laws to have been, that the Bankrupt having been guilty of a Fraud, ſhould not be truſted any more with the Management of his Eſtate; but that it ſhould be put into other Hands, for the Safety of his Creditors, and that the Bankrupt ſhould have no further Intermeddling therewith.

So that upon this Intention, all thoſe Effects, and Debts, which he could take in, or turn into Money,

---

(*a*) Sect. 12.

ney, the Aſſignees were deſigned to have, in as full a Manner, either by Action, or otherwiſe, and that in their own Name.

The Rule of Common Law to guide in Conſtruction of Statutes.

The beſt Rule of conſtruing Acts of Parliament is by the Common Law, and by the Courſe which that obſerved in like Caſes of its own, before the Act.

Thus it is upon the Statute *De donis*, which enacts, that Tenant in Tail *non habeat poteſtatem alienandi tenementa*, to prevent their coming to the Iſſue; and that a Fine levied by him, *ipſo jure ſit nullus*. Now,

The Effect of this Statute being a Diſability to alien to the Prejudice of others; therefore the Law ranks the Perſon incapacitated thereby, with Biſhops and other Eccleſiaſtical Perſons, and with Husbands, who were by the Common Law diſabled to alien to the Prejudice of their Succeſſors and Wives.

And therefore, tho' the Words be, That Tenant in Tail ſhall not have Power to alien, and that his Fine ſhall be void, yet it has been conſtrued, that a Fine by Tenant in Tail, is not *meerly void*, but makes a Diſcontinuance, thereby putting the Iſſue to his *Formedon*; and that other Alienations, either put the Iſſue to his Action, or allow of his Entry, juſt as the Law ſtood before, in Relation to Biſhops, *&c.*

At Common Law, it is a general Rule, that no Body can have an Action but the Creditor, or, if he be dead, his Repreſentative; but there are two Caſes wherein this Rule fails, (*viz.*) in the Caſe of a Forfeiture, and of an Aſſignment to the King; for tho' a *Choſe in Action* cannot be aſſigned to a common Perſon, yet it may to the King; and in both theſe Caſes, the King, or

Choſe in Action may be aſſigned to the King, and he, or his Grantee, may have an Action for it in their own Name.

or his Grantee or Aſſignee, may ſue for thoſe Debts in their own Name. 21 *H.* 7. 19. Though generally, the Grantee ſued in the King's Name; but that was only in order to take Advantage of the Prerogative.

Now let us ſee how far the Wife's Debts were liable in theſe Caſes:

In the Caſe of Forfeiture, as by Utlawry, *&c.* the Debts of the Wife were always extended and ſeiſed.

Debts due to the Wife, *dum ſola*, forfeited, and aſſignable to the King by the Huſband.

In the Caſe of Aſſignment of Debts to the King, *Hob.* 253. is an Authority in Point, and that notwithſtanding the 7 *Jac.* 1. *cap.* 15. which makes Aſſignments of Debts void, other than ſuch as grew due originally to the King's Debtor *Bonâ fide*; for the Purpoſe of that Law was, that no Debtor of the King ſhould procure another Man's Debt to be aſſigned, which was the common Practice; but this, ſays the Book, is his own Debt, tho' not to his own Uſe, which he may himſelf releaſe and diſcharge; and by the ſame Reaſon, may aſſign.

This proves two Things:

1*ſt*, That the Huſband might aſſign theſe Debts by the Common Law.

2*dly*, That he was not reſtrained from doing it by the Statute, becauſe they were the Huſband's own Debts.

This Reaſon concludes to the Caſe at Bar.

1*ſt*, As it is the Huſband's own Debt within the Words of the Act.

2dly, That as the Huſband might aſſign it, *ergo* ſo may the Commiſſioners.

Beſides, it is to no Manner of Purpoſe, and can ſerve no good End at all, to ſay, that ſuch Debts are not aſſignable; for if they ſhould be left in the Huſband, as ſoon as ever he recovers them, the Commiſſioners muſt have the Money, and apply it to the Uſe of the Creditors.

But in order to confine the Senſe of the Words " Debts due and owing to him", it has been

Objected, *1ſt*, That the Statute does not extend to Debts due to a Bankrupt as Executor.

Reſp. This is true; but it is for this particular Reaſon, becauſe they are appropriated to pay the Debts of the Teſtator, and if they were aſſigned, it would be a Wrong, (*viz.*) a *Devaſtavit*.

2dly, It has been objected, that the Statute does not extend to Debts due to the Bankrupt jointly with another.

Reſp. The Caſe cited for that Purpoſe from 1 *Lev.* 17. is not determined; ſuch Debt might be aſſigned to the King, by any one of the Creditors; and ſo it is adjudged *Mich.* 19 *H.* 6. 47. and it would be forfeited by the Utlawry of one.

However, that Caſe is not before us: Thus far is plain, that a Debt due from him and another, would be within this Act of 4 *Anna*; for it is ſo declared by the declaratory Act of (*a*) 10 *Anna*, which provides, at the

---

(*a*) Cap. 15. ſect. 3.

the ſame Time, that the Diſcharge of the Bankrupt ſhall not extend to diſcharge the other joint Debtor.

But this of a Huſband and Wife is a different Caſe; for it is his Debt, as he is one with her.

But it is contended, that the Bankruptcy ought not to give the Huſband a better Right in his Wife's Debt, and bar her of her Contingency of Survivorſhip.

Reſp. It does not give him a better Right; for his Releaſe for a Conſideration to himſelf alone, would have barred her of the Contingency; and this is a Releaſe in Law, and amounts to the ſame Thing.

Beſides, this is anſwered by the Fiction of Law, whereby the Statute of 1 *Jac. cap.* 15. and this Statute have made it as a Debt, and a new Security to the Aſſignees. Suppoſe a Bond were made to *A.* in Truſt for *B.* who becomes a Bankrupt, the Aſſignees may bring the Action in their own Name, tho' *B.* muſt have brought it in the Name of his Truſtee.

Objected, The Huſband muſt join with the Wife in this Action; but the Aſſignees cannot do it.

Reſp. This is anſwered (as before) and by the Caſes of Forfeiture, and Aſſignment to the King. But to put another Caſe:

Suppoſe a Bill of Exchange be made to the Wife, *dum ſola*; the Huſband may aſſign it, and the Aſſignee ſhall bring the Action in his own Name.

Debts due from the Wife conſidered.

This Reaſoning holds ſtronger in the Caſe of Debts due from the Wife; for, 1*ſt*, Certainly it is the Huſband's Debt, and the Action muſt be brought in the *Debet* and *Detinet*; it is admitted to be the Huſband's Debt, after Judgment, and it were hard to ſay, that a Judgment of Law charges a Man with a Debt, who was not chargeable with it, when that Judgment was given againſt him.

2*dly*, If the Intent of the Act be conſidered, and the Queſtion aſk'd *Cui bono?* it will appear ſtill ſtronger.

The Perſons concerned in this Matter are,

1*ſt*, The Bankrupt.

2*dly*, The Creditors.

3*dly*, The Wife.

As to the Bankrupt; if an Action be brought againſt him on ſuch Bond, what Execution can the Plaintiff have? If he takes a *Fi' Fa'* or *Elegit*, as ſoon as he finds Goods or Lands, the Commiſſioners ought to ſeiſe them; this would be wholly ineffectual; and if he takes a *Capias*, it will only ſerve to lay the Bankrupt up in Priſon, when all his Eſtate, wherewith he ſhould make Satisfaction and deliver himſelf, is taken out of his Power; and that is the Reaſon of his being diſcharged, (*viz.*) becauſe his Ability to pay is intirely taken from him.

And this diſtinguiſhes it from the Caſe of an Executor, and ſhews, that *he* ought not to be diſcharged as to the Teſtator's Debts, for he retains his Ability to pay them, by keeping the Effects which he has as Executor, and the Commiſſioners cannot meddle with them, becauſe they are appropriated.

It was inſiſted at the Bar, that he ought to be diſcharged from all his Debts, becauſe he is obliged to part with all his Eſtate liable to pay thoſe Debts; but this takes it up much too ſhort; for he is not only obliged to deliver up all his Eſtate *liable* to pay Debts, but all whatſoever wherewith he *might* pay his Debts; as for the Purpoſe, Copyhold Lands, which are liable to no Execution.

2dly, As to the Creditor.

It cannot be for his Benefit, that this Debt ſhould not be within the Act; for the Bankrupt's whole Eſtate will be otherwiſe diſpoſed of; and his Action againſt the Bankrupt can be worth nothing; but if this Debt be within the Act, then may he come in for his Dividend.

The Conſequence of the contrary Opinion is, that you take from him every Thing wherewith his Debt may be paid, and at the ſame Time will not let him in for a Share.

3dly, As to the Wife.

Wife is for ever diſcharged by the Diſcharge of the Bankrupt Huſband.

It will be a Diſcharge to her, at leaſt a temporary one, (*viz.*) during the Husband's Life; but tho' it be not neceſſary to give any Opinion upon that, yet I think it will amount to a perfect Releaſe, and the Wife will be diſcharged for ever.

But no Harm can ariſe from this; for the Creditor is ſuppoſed to have had his Dividend, and the Debt is paid, in Conſideration of Law.

A Caſe may poſſibly be put, where a Woman being in Debt, may make over all her Effects in Truſt, and then marry a Bankrupt, and by that diſcharge all her Debts, and yet preſerve her Eſtate; but that would be a fraudulent Conveyance, as againſt Creditors, *quoad* ſo much of the Eſtate as would ſatisfy their Debts, and for that they might have Remedy.

Objection.

It was objected, that this Diſcharge is a perſonal Privilege, and not communicable to the Wife.

Husband poſſeſſed of a Term for Years *in jure uxor'*, it may be ſold on a *Fi' Fa'*. (*a*) 1 Inſt. 46. b. 299, 300.

Reſp. It is a neceſſary Conſequence, that it muſt extend to her; becauſe every Thing in the Huſband's Power is aſſignable, and all her Eſtate is in his Power: If the Huſband be poſſeſſed of a Term for Years in Right of his Wife, it may be ſold on a *Fi' Fa'*, and yet it is not (*a*) actually transferred to the Husband by the Intermarriage.

For theſe Reaſons, we are all of Opinion, that this is the Huſband's Debt within the Meaning of the Statute.

Second Queſtion. Plea ought to conclude to the Country.

As to the ſecond Queſtion, (*viz.*) whether the Plea be good or not?

We are likewiſe all of Opinion, that it is ill not to conclude to the Country.

A Liberty of Pleading *generally* is given to the Bankrupt, and ſo he may avoid the Hazard of pleading *ſpecially*; but then he muſt take upon him the Proof of his Conformity to the Statute, in every Particular; or if he thinks fit to plead the Matter ſpecially, then he muſt ſet forth every Point; and by it, he has this Advantage againſt the Plaintiff, that *he* muſt reply one Particular only, upon which Iſſue muſt be taken. Here the Defendant has pleaded the Matter ſpecially, but not ſet forth the whole, and therefore it is ill for that Reaſon; for by the expreſs Words of the Act, this is to be pleaded ſo, as that the whole Merits may be tried.

Caſes at Common Law, where a Man muſt conclude to the Country without an Affirmative and Negative.

There are ſeveral Caſes at Common Law, where a Man ſhall conclude his Plea to the Country, tho' there be no Affirmative and Negative, to prevent the Inconvenience that would ariſe by going on to a Replication; as in 33 *H.* 6. 21. to a Fine *Quod partes finis nihil habuerunt*; *& de hoc ponit ſe ſuper Patriam.*

So in a Counterplea of a Voucher, That he was never ſeiſed of ſuch Eſtate whereof he could infeoff him; *& hoc petit, &c.*

So in a Dower *Nunqu' ſeiſie de dower*; *& de hoc, &c.*

And the Reaſon of this is, for that it would be inconvenient to go on to a Replication; becauſe to reply generally, would leave it too large and comprehenſive; and to reply any particular Kind of Eſtate, would be too narrow, and conſequently immaterial.

This Statute has formed a new general Iſſue.

This Statute has formed a new general Iſſue in this Caſe; and this was the Foundation of the Judgment in *Bird* and *Lacy*'s Caſe, *Mich.* 6 *Annæ*, *C. B. Rot.* 321. that a Plea upon this Act was well concluded to the Country; and if ſo, it cannot conclude to the Court.

It may be obſerved on the Statute of Sewers, (23 *H.* 8. *cap.* 5.) that by the Words of that Act, a general Replication is expreſly given, to avoid the forcing the Plaintiff to a ſingle Point, and ſo the Miſchief, which would be in this Caſe, is prevented. Thus it muſt have been in this Act, if it had not been the Intention of it to make the Plea a general Iſſue.

For this Fault in the Plea, which is ſhewn for Cauſe of Demurrer, and which would put a Difficulty on the Plaintiff, not intended by the Statute, Judgment muſt be given for the Plaintiff.

Caſe 58.
At Lord Chancellor's.

Ex parte Mackerneſs. On Petition.

A ſingle Creditor, to whom 103 *l.* was due from *A.* by two Notes, and 53 *l.* Part thereof not yet payable, before the 5th of *Geo.* 2. ſues out a Commiſſion of Bankruptcy; ſuch Commiſſion ſet aſide as irregular.

J. S. a Weaver, ſold to *Mackerneſs*, a Mercer, ſome Silk for 103 *l.* and at the ſame Time took two Notes from *Mackerneſs* for Payment thereof, (*ſcil.*) one Note for 50 *l.* payable at a Day ſince paſt, and another Note for 53 *l.* at a Day yet to come.

And before the laſt Day of Payment incurred, *J. S.* took out a Commiſſion of Bankruptcy againſt *Mackerneſs*, who was really a Bankrupt, but petitioned to ſet this Commiſſion aſide as irregularly taken out, it being taken out at the ſingle Petition of *J. S.* to whom (*a*) only 50 *l.* and not 103 *l.* was *then* due; and the Statute 5 *Annæ*, *cap.* 22. requires, that if a ſingle Creditor ſues out a Commiſſion, a Debt of 100 *l.* muſt be due to him; if two Creditors ſue it out, there muſt be 150 *l.* due to them; if three or more, there muſt be 200 *l.* or more due to them.

(*a*) Vide poſt 610. *ex parte James.*

Whereupon Lord Chancellor ſuperſeded the Commiſſion, ſaying, that in a late Caſe the Lord C. J. *Parker* was of the ſame Opinion; and that Lord *Trevor*, diſ-

---

See the Statute of 7 *Geo.* 1. *cap.* 31. whereby ſuch Creditors by Note or Bond, payable at a future Day, are admitted to prove their Notes, *&c.* and are intitled to a proportionable Part of the Bankrupt's Eſtate; tho' they muſt not join in ſuing forth the Commiſſion till ſuch their Debts become payable. However, by the 5th of his preſent Majeſty, Perſons having Bills, Bonds or Notes, payable at a future Day, may join in petitioning for Commiſſions.

courſing with the Lord Ch. J. *Parker* and himſelf in the Houſe of Lords, ſeemed to concur in ſuch Opinion likewiſe: But the Court denied to aſſign the Bond, the Commiſſion not appearing to be taken out *maliciouſly* or *fraudulently*, which are the (*a*) Words of the Act.

(*a*) Sect. 7.

Tucker verſus *Wilſon, Adminiſtrator of Thynn.*

Caſe 59.

Lord Chancellor Harcourt.

Exchequer Annuities mortgaged may be ſold upon Notice, without a Foreclosure.

ONE poſſeſſed of an Exchequer Annuity for ninety-nine Years, borrowed Money upon it, and for ſecuring this Money, there was an abſolute Transfer of the Annuity, but with a Defeazance, that if the Money were paid at ſuch a Day, the Aſſignment ſhould be void.

The Money was not paid at the Day; upon which the Lender frequently deſired the Money, and gave Notice that he would ſell, and appointing a Time for that Purpoſe deſired the Borrower to be preſent to ſee that the Annuity was ſold at the full Value.

The Borrower, by Letter, deſired that the Lender would ſtay a Week longer before he ſold, which was alſo complied with; and then the Lender dying ſuddenly, the Defendant, his Adminiſtrator, ſold the Annuity at the Exchange, by a ſworn Broker, for the full Value that thoſe Annuities then ſold for, and which was leſs than what the Money due to the Defendant amounted unto.

Theſe Annuities afterwards roſe in Value; whereupon the Mortgagor brought a Bill to redeem, or to compel the Defendant to purchaſe another Annuity on the ſame Fund, and of the ſame yearly Value, to be

transferred

transferred to the Mortgagor, on his Payment of Principal and Intereſt.

Lord Chancellor: Here is no expreſs Power to ſell; and Annuities for ninety-nine Years are like Rent-charges out of Lands, and not like Stocks, which may be thought to be of imaginary Value; and there being no Decree for Forecloſing the Mortgagor, nor any Agreement in Writing, that the Mortgagee ſhould ſell; let the Defendant procure an Annuity of the like Value, and upon the ſame Fund, to be conveyed to the Plaintiff upon his Payment of the Principal and Intereſt to the Defendant; and let the Maſter compute what is due for Principal and Intereſt.

From which Decree an Appeal was brought in the Houſe of Peers, where it was inſiſted, that theſe Exchequer Annuities, as well as Stocks, were uſually ſold at the Exchange, and that this was but as a Pawn; and though there was no expreſs Power to ſell in the Defeaſance, yet by the Mortgagor's Letter, it was plainly ſubmitted to, when the Mortgagor deſired the Sale might be deferred for a Week; that the Convenience of theſe Securities, among Merchants, was, that after the Day of Payment paſt, they were taken to be ready Money; and that it would be infinitely troubleſome, and dilatory, if there could be no Sale of ſuch Annuities thus pledged, without a Decree of Forecloſure; that this would ſet aſide ſeveral Sales that had been made in the like Caſes, and occaſion Multiplicity of Suits; that the Caſe here was the ſtronger, it being that of an Adminiſtrator, who was obliged to diſpoſe of the Aſſets of the Inteſtate to pay his Debts and Legacies.

Wherefore the Decree was reverſed by the Lords *Nemine contradicente*.

Done's Caſe.

Caſe 60.

Lord Chancellor Harcourt.

Salk. 702.

A *Ne exeat regnum* lies to prevent one's going to *Scotland*, and alſo for a Defendant in an Account againſt a Co-Defendant.

ON an Application made to the Court for a *Ne exeat regnum*, to ſtop the Defendant from going to *Scotland*, it was objected, that ſince the Union, *Scotland* was Part of this Kingdom, and conſequently, that going to *Scotland* could not be conſtrued *going out of the Kingdom*, nor any Breach of the Condition of the Security given on ſuch Writ.

Lord Chancellor: Scotland being out of the Juriſdiction of this Court, and conſequently out of the Reach of the Proceſs thereof, the Defendant's going into *Scotland* is equally miſchievous to the Suitor here, as if he went actually out of the Kingdom; wherefore take a *Ne exeat regnum*; and tho', in this Caſe, the Party moving for the Writ be alſo a Defendant, yet, foraſmuch as it is a Matter of Account, in which (*a*) both Parties are Actors, and Money being ſworn due from the Party, againſt whom the Writ is prayed, to the other, the Motion is proper.

How the Condition of the Recognizance in ſuch Caſe muſt be worded.

Note; Where the Party is to be reſtrained from going to *Scotland*, the Condition muſt be, not to go out of the Realm, *or to Scotland*; for if it be only, not to go out of the Realm, the Party's going to *Scotland* will not forfeit the Bond or Recognizance.

(*a*) Vide Preced. in Chan. 197. For which Reaſon alſo, after a Decree to account, and Abatement of the Suit by the Defendant's Death, his Repreſentative may revive.

D E

DE
Term. S. Michaelis,
1714.

Caſe 61.

Lord Chancellor Cowper.

2 Vern. 689. Vide etiam poſt *Bagot* verſus *Oughton*, 347.

Husband borrows Money, Husband and Wife levy a Fine of the Wife's Land as a Mortgage for it, and Husband by Will gives Legacies to Charities to the Amount of his perſonal Eſtate, and dies; the Mortgage ſhall be paid out of his perſonal Aſſets, tho' the charitable Legacies will be thereby loſt; but all the Husband's Debts, tho' by Simple Contract, ſhall be preferred to the Mortgage.

Tate verſus *Auſtin*.

HUSBAND ſeiſed in Right of his Wife, borrows 500 *l.* in order to ſupply his Occaſions, particularly to buy himſelf a Commiſſion in the Army, and for the Securing of this Money, he and his Wife levy a Fine of the Wife's Inheritance, and raiſe a Term of 500 Years, which is limited to the Perſon lending the 500 *l.* to be void upon the Payment of the 500 *l.* and Intereſt, with Remainder to the Uſe of the Wife in Fee; and in the Deed the Husband covenants to pay the Mortgage-Money.

Afterwards the Husband makes his Will, by which he gives ſeveral Charities out of his perſonal Eſtate, and dies indebted by Simple Contract.

The Widow brings her Bill to have this Mortgage, made of her Inheritance, diſcharged out of her Husband's perſonal Eſtate. On the other Hand, The Aſſets were not ſufficient to pay the Mortgage-Money, and alſo the Charities given by the Will.

Lord Chancellor: This Mortgage is a Debt of the Huſband, which muſt be paid before Legacies; and the Wife, by conſenting to charge her Land with it, does not make it leſs his Debt than it was before; the perſonal Eſtate ſhall be liable to pay Debts, before Legacies, tho' to (*a*) a Charity, for they are ſtill but Legacies; but all other Debts of the Huſband ſhall be preferred to this; every thing ſhall be taken favourably for the Wife, who, for the ſupplying the Huſband's Occaſions, has agreed to charge her Land with a Debt of his. The Fine and Deed of Uſes, by which the Mortgage is created, are but as one Conveyance; ſo that theſe Legacies, (tho' for a Charity) are to be left unpaid, ſince it appears there are not Aſſets of the Huſband to pay both the Mortgage and the Legacies.

On this Occaſion Lord Chancellor put the Counſel in Mind of Lord (*b*) *Huntington*'s Caſe, where Huſband ſeiſed in Fee, in Right of his Wife, did with his Wife by Deed and Fine mortgage her Eſtate for 500 Years, Remainder to the Uſe of the Wife in Fee. The Mortgage was to raiſe a Sum of Money for the Uſe of the Huſband to buy him a Place, which accordingly he did buy, and thereby got Money, and paid off the Mortgage, taking an Aſſignment of it in Truſt for himſelf, his Executors and Adminiſtrators; afterwards the Huſband and Wife died, and the Heir of the Wife brought his Bill to exonerate the Inheritance, and to have this Mortgage paid off out of the Huſband's perſonal Eſtate:

(*b*) 2 Vern. 437. See alſo the Caſe of *Pocock* verſus *Lee*, 2 Vern. 604.

(*a*) Vide poſt in *Maſters* verſus *Maſters* 422, and *Attorney General* verſus *Hudſon* 675. Legacies to a Charity, on a Deficiency of Aſſets, are to abate in Proportion, as well as other pecuniary Legacies.

And tho' it was decreed by Lord Keeper *Wright*, that the Heir of the Wife was not intitled to have the perſonal Eſtate of the Huſband ſo applied; yet upon an Appeal to the Houſe of Lords, that Decree was reverſed, and the Mortgage decreed to be paid out of the Huſband's perſonal Aſſets; which Lord *Cowper* thought very juſt. *Quod nota*; It being inſiſted upon, that it was a *Gift* of ſo much Money from the Wife to the Huſband, and therefore not to be refunded.

Caſe 62.

Sir Cæſar Child and others, Aſſignees of a Commiſſion of Bankruptcy taken out againſt Sir Stephen Evans, *Plaintiffs;*

Thomas Frederick Eſq; *Defendant.*

Firſt Bill to be anſwered before the Croſs-Bill. *A.* brings his Bill againſt *B.* and *C.* who put in inſufficient Anſwers, and prefer their Croſs-Bill againſt *A. B.* becomes a Bankrupt; his Aſſignees bring their Bill in Nature of a Bill of Revivor againſt *A.* they ſhall not go on till *C.* has anſwered *A.*'s Bill.

MR. *Frederick* brought his original Bill againſt Sir *Stephen Evans* and *Hayter*, as Partners, for an Account, and Sir *Stephen Evans* and *Hayter* brought their Croſs-Bill againſt Mr. *Frederick*; but *Frederick*'s Bill (after many Diſputes) being ſettled to be prior, it was ordered that that ſhould be firſt anſwered; upon which, Sir *Stephen Evans* and *Hayter* put in an Anſwer, which was reported inſufficient; then Sir *Stephen Evans* becomes a Bankrupt, and his Eſtate is aſſigned by the Commiſſioners to Sir *Cæſar Child* and others, who bring their Bill in Nature of an original Bill againſt Mr. *Frederick* for this Account; and Mr. *Frederick* pleading the Statute of Limitations, his Plea was allowed.

Afterwards Sir *Cæſar Child* and others, the Aſſignees, bring their Bill in Nature of a Bill of Revivor, grounding it upon the former Bill brought by Sir *Stephen Evans*.

And it was now moved by Mr. *Frederick*, and ſo ordered by the Lord Chancellor, that *Hayter*, who was a Co-Plaintiff with Sir *Stephen* in the former Bill, ſhould anſwer Mr. *Frederick*'s Bill, before Mr. *Frederick* ſhould anſwer Sir *Cæſar*'s Bill; in regard, Sir *Cæſar*'s Bill, had it not been in the Nature of a Bill of Revivor of Sir *Stephen*'s original Bill, would have been barred by the Statute; and then, if Sir *Cæſar* ſtood in the Place of Sir *Stephen Evans* and *Hayter*, he could not be in a better Condition; conſequently, ſince, if Sir *Stephen* had been alive and continued Plaintiff, *Hayter*, as well as he, muſt have firſt anſwered Mr. *Frederick*'s Bill, ſo muſt *Hayter* do now; and as one Way, (*viz.*) (to get out of the Statute of Limitations,) Sir *Cæſar* had the *Benefit* of coming into Sir *Stephen*'s Place, ſo muſt he ſubmit to have the *Diſadvantage* of it the other Way.

Anonymus.

Caſe 63.

ONE Deviſes all his Goods; and whether a Debt by Bond paſſed to the Deviſee, was the Queſtion.

Deviſe of all one's Goods paſſes a Bond.

Decreed by Lord Chancellor *Cowper*, that it did; that theſe Words ſeemed at Common Law to paſs a Bond, and to extend to all the perſonal Eſtate; but this being in the Caſe of a Will, and a Will relating to a perſonal Eſtate too, it ought to be conſtrued according to the Rules of the (*a*) Civil Law.

Civil Law divides all Manner of Eſtates into *Bona mobilia* and *Bona immobilia*.

(*a*) Ante 12. and in *Plume* verſus *Beale*, 389.

Now the Civil Law makes *Bona mobilia*, and *Bona immobilia*, the *Membra dividentia* of all Eſtates; *Bona immobilia* are Land, *Bona mobilia* are all Moveables, which muſt extend to Bonds; and therefore, by the Deviſe of all the Teſtator's Goods, a Bond muſt paſs.

Caſe 64.

Floyer verſus *Lavington*.

One for 800 *l.* Conſideration grants a Rent-Charge of 48 *l.* a Year in Fee, upon Condition, that if the Grantor during his Life ſhall give Notice, and pay in the 800 *l.* by Inſtalments, *viz.* 100 *l.* at the End of every ſix Months, and ſhall do this during his own Life-time, the Grant to be void; the Mortgage was made about ſixty Years ſince, when the legal Intereſt of Money was 8 *per Cent.* Decreed not redeemable.

ONE grants a Rent-Charge in Fee of 48 *l. per Annum*, upon Condition, that if the Grantor ſhall at any Time give Notice of his Intention to pay in the Conſideration Money (being 800 *l.*) by Inſtalments, *viz.* 100 *l.* at the End of every ſix Months, and ſhall, purſuant to ſuch Notice, pay the ſaid Money and Intereſt, *at any Time during his Life-Time*, then the Grant to be void; but there is no Covenant in the Deed from the Grantor of the Rent-Charge to pay the Money, and the Rent-Charge was much leſs than what the Intereſt of the Money came to, (for the Intereſt was at that Time 8 *per Cent.* the Conveyance being made above ſixty Years ſince,) and the Grantee of the Rent-Charge had conveyed it over, after the (*) Grantor's Death, to a Purchaſor, to whom he had given a Collateral Security for quiet Enjoyment, and the Purchaſor had afterwards made a Marriage Settlement of it.

And now, upon a Bill brought by the Heir of the Grantor, to redeem this Rent-Charge, the only Queſtion was whether it was redeemable.

(*) *Quære* when the Mortgagor died.

Sir *Joſeph Jekyll* for the Plaintiff. The Clauſe reſtraining the Redemption to the Life of the Mortgagor is of no Force; for an Eſtate once redeemable cannot be rendered irredeemable by any Words or Agreement made at the ſame Time; for as the Borrower is commonly neceſſitous, this would put it in the Power of the Scrivener, to make Advantage of ſuch Neceſſities, and would let in Oppreſſion, and forecloſe the Power and Juriſdiction of this Court.

In Caſe of a Mortgage no Clauſe can confine the Equity of Redemption to the Life-time of the Mortgagor, or to him and the Heirs Male, or Heirs only of his Body.

In 2 *Chan. Rep.* 147. (*a*) *Howard & Ux.* verſus *Bonham*, the Clauſe was, that if the Mortgagor, at any Time, during his Life, ſhould pay the Money, the Mortgage ſhould be void; and in that Caſe there was no Covenant to pay any Intereſt or Principal, and the Circumſtances there, were much ſtronger than in the preſent Caſe, the Conveyance being to a *Siſter*, and frequent Declarations made by the Mortgagor, that his Niece, who was his Brother's Daughter, and had brought the Bill to redeem, ſhould not inherit the Eſtate.

(*a*) 1 Vern. 7. *Newcomb* verſus *Bonham.*

However, it was in that Caſe admitted by Counſel on both Sides, and decreed, that a Power of Redemption could not be barred by any Clauſe or Agreement made at the ſame Time with the Mortgage.

So in 2 *Chan. Rep.* 147. (*b*) *Howard* verſus *Harris*, an Equity of Redemption was limited to the Grantor and the Heirs *Male of his Body*; yet it was decreed, that the *Heir General* of the Grantor ſhould redeem; and it is there particularly laid down as a Rule, that where the Conveyance is but a Mortgage, no Words or Clauſe ſhall prevail to bar the Grantor, *his Heirs* or *Aſſigns* from redeeming; otherwiſe the Act of a Scrivener would

(*b*) 1 Vern. 33.

would be too hard for the Power and Juriſdiction of the Court of Chancery.

Mortgage of a Rent redeemable at a greater Diſtance of Time, than a Mortgage of Lands.

Then as to the Length of Time, this Caſe differed from the Caſe of Lands, where the Profits and Outgoings being uncertain, the allowing a Stale Redemption, would, (probably) put a Difficulty upon the Mortgagee in his Accounting: But in the Caſe of a Rent-Charge, the Revenue was certain, and the Out-goings (if any) certain alſo.

(c) Vide 2 Vent. 340.

But what he chiefly relied upon, was, that as the Statute of Limitations, had, in the Caſe of Lands, after twenty Years Poſſeſſion, barred the Plaintiff of his Entry or Ejectment, ſo the Court of (a) Equity, in Imitation of that Law, would not allow the Mortgagor to redeem the Mortgage, after the Mortgagee had been twenty Years in Poſſeſſion; and that the ſame Length of Time ſhould bar a Redemption in Equity, as barred an Entry at Law.

But that at Law, in Caſe of a Rent-Charge, though that had not been paid, or demanded, for twenty Years, yet ſuch Duty being created by Deed (as all Rent-Charges muſt be) no Part of the Remedy was taken away; and he cited the Caſe of Lord *Widdrington* verſus *Jennings*, in Lord *Harcourt*'s Time, where the Court took ſuch a Difference betwixt a Mortgage of a Rent-Charge, and of Land; and in the former Caſe, after a very long Time, (I think eighty Years) allowed of a Redemption.

Mortgage may be without Covenant or Bond for the Mortgagor to redeem.

As to the Objection, that here was no Covenant for the Payment of the Principal or Intereſt, he ſaid, that was not Material; the ſame not being neceſſary for the making of a Mortgage, nor yet neceſſary, that the

Right ſhould be mutual, (*viz.*) for the Mortgagee to compel the Payment, as well as for the Mortgagor to compel a Redemption; ſince ſuch Conveyance as in the preſent Caſe, though without any Covenant or Bond for the Payment of the Money, would yet be plainly a Mortgage.

That when the Grantee of the Rent-Charge, did, after the Death of the Grantor, ſell the Rent-Charge, and give a Collateral Security for the quiet Enjoyment of it againſt the Heirs of the firſt Grantor, this manifeſted it to be the Apprehenſion of the Parties themſelves, that it was a redeemable Eſtate, and accepted as ſuch, with a Counter-Security againſt it.

And, that though a Mortgage were made never ſo many Years ſince, yet if the Mortgagor, and thoſe claiming under him had continued to pay Intereſt, the Length of Time was, in ſuch Caſe, no Objection to the Right of Redemption.

Mortgage, though never ſo old, is redeemable, if Intereſt has been paid.

Now in this Caſe, the Rent-Charge was the Intereſt agreed on by the Parties, and the Payment of the Rent-Charge, the Payment of Intereſt; by which, the Objection of the Length of Time was wholly taken off. But,

Lord Chancellor Cowper conceived the Rent-Charge to be not redeemable, at ſo great a Diſtance of Time, and that this Court had heretofore gone too far in permitting Redemptions.

It was material, that at the Time of making the Mortgage, Intereſt was at 8 *l. per Cent.* and therefore the Rent-Charge of 48 *l.* a Year, being ſo much leſs than the yearly Intereſt of 800 *l.* at 8 *per Cent.* (which came to 64 *l.* a Year) the Payment of the Rent-Charge could not be taken to be the Payment of the Intereſt.

That here ſeveral Circumſtances concurred, which, though each of them, ſingly, might not be of Force to bar the Redemption, yet all of them, joined together, were ſtrong enough to prevail over it.

That the Mortgagee ſeemed to have allowed a Conſideration for the purchaſing the Equity of Redemption after the Death of the Mortgagor:

1*ſt*, By taking the Rent-Charge at 48 *l. per Annum.*

2*dly*, By agreeing to take his Principal Money by *Inſtalments*.

3*dly*, By leaving it at the Election only of the Mortgagor, whether he would redeem or not; and there could be no Reaſon given, why ſuch a Contingent Right of Redemption might not, upon fair and reaſonable Terms, be purchaſed.

That the Length of Time, where ſo great, as in the preſent Caſe, was a good Bar of Redemption of a Rent-Charge as well as of Land; that the Alienation, Purchaſe, and Settlement of this Rent-Charge after the Death of the Mortgagor, being all without any Fraud, were of Weight; as likewiſe, that the Mortgagor was not bound to pay the Money by any Covenant; that the Purchaſe of this Rent-Charge did no ways, either create, or admit of a Right of Redemption,

demption, by taking the Security againſt a Redemption, that being only a prudent Caution made uſe of by the Purchaſor, which the Seller, being ſatisfied it would not hurt Himſelf, might adviſe him to.

Wherefore the Court decreed, that the Bill for a Redemption ſhould be diſmiſſed with the uſual Coſts, it being only upon Bill and Anſwer. But it was thought that the Length of Time was the chief Objection to the Redemption.

DE

Term. S. Hillarii,

1714.

Caſe 65.

Perkins verſus *Micklethwaite*.

One Deviſes Portions to his Children, *A. B.* and *C.* and if any die before twenty-one or Marriage, the Portion of the Child ſo dying to go to the Survivor; one of the Children dies in the Life-time of the Teſtator; this is not a lapſed Legacy, but ſhall go over to the ſurviving Children.

ONE *Micklethwaite*, who was the Defendants Father, had two Sons *Thomas* and *Joſeph*, and alſo two Daughters, and made his Will, Giving thereby 1500 *l.* to his youngeſt Son *Joſeph*, and 1000 *l.* to each of his two Daughters, and directed, that if any of his three younger Children ſhould die before their Age of twenty-one or Marriage, then the Portion of him, or her, ſo dying, ſhould go over to the Survivors, and gave his real Eſtate to his eldeſt Son chargeable with theſe Portions.

One of the Daughters died within Age, and before Marriage; *Joſeph* the younger Son died alſo within Age, and before Marriage, in the Life-time of his Father the Teſtator.

The

The Father lived to have another Son, whom he named *Joſeph*; and afterwards wrote a Codicil at the Bottom of his Will, by which he confirmed the Will, thereby taking Notice, that ſince the laſt, it had pleaſed God to give him another Son, and gave a Legacy of 500 *l.* a-piece to his Son *Joſeph*, and his ſurviving Daughter, over and above what he had given them by his ſaid Will.

Upon this Cauſe's coming on firſt before Lord Chancellor *Harcourt*, touching the Share of the deceaſed Daughter's Portion, *viz.* Whether, upon the Death of the Son *Joſeph*, the Share of the ſaid deceaſed Daughter, that was veſted in *Joſeph*, ſhould ſurvive with *Joſeph*'s Portion?

His Lordſhip decreed it ſhould not; becauſe the Portion of the deceaſed Daughter became veſted in *diſtinct Shares* in the ſurviving Children, and there were no Words for creating a Jointenancy of theſe Shares. [*Quære autem*, for a Deviſe over to two or more, is a joint Deviſe of Courſe, unleſs there be Words to ſever the Jointenancy.] But

The other Points, being reſerved, were argued now before Lord Chancellor *Cowper*; and whereas it was objected, that by the Death of *Joſeph* in the Life-time of the Teſtator, his Father, the 1500 *l.* Portion given to him became a lapſed Legacy, and ſhould ſink into the Eſtate:

Lord Chancellor ſaid, it was improper to call this a lapſed Legacy, but it was a Portion given (*a*) over, and ſhould take Effect; that the making the Codicil was a Republication of the Will, and did amount to a Sub-

(*a*) Ante *Lord Bindon* verſus *Lord Suffolk*, 96. and in *Northey* verſus *Strange*, 343.

a Subſtituting the ſecond *Joſeph* in the Place of the firſt; as if the Teſtator had made his Will anew, and had writ it over again, by which new Will the ſecond *Joſeph* muſt take; and that the fixed Intention of the Teſtator appeared to be, that *Joſeph* ſhould have more than his Daughter; whereas, if the 1500 *l.* Legacy ſhould be taken to be a lapſed Legacy, then the ſurviving Daughter ſhould have twice as much as *Joſeph*.

DE
Term. S. Trinitatis,
1715.

Finch & al' verſus *Earl of Winchelſea.*

Caſe 66.

One agrees for a valuable Conſideration to convey Lands to *J. S.* and afterwards confeſſes a Judgment to *J. N.* If the Conſideration Money paid by *J. S.* be any ways adequate to the Value of the Land, it binds the Land in Equity, and ſhall defeat the Judgment; *ſecus* of a Mortgage, or if the Conſideration were inadequate.

THE Counteſs Dowager of *Winchelſea* being Jointreſs for her Life of the Premiſſes, Remainder in Tail to the late Earl, Remainder over,

The late Earl entered into an Agreement with the Counteſs, that in Caſe ſhe would make to him a conditional Surrender of her Eſtate for Life, in order to enable him to mortgage Part of the Premiſſes, he would ſettle the Reſidue of the Premiſſes, together with the Equity of Redemption, upon himſelf for Life, Remainder to his firſt, *&c.* Son, Remainders over, under which the Plaintiffs claimed.

The Counteſs Dowager accordingly makes her conditional Surrender; and the late Earl ſuffered a Recovery, and made the Mortgage, and afterwards died, without ever ſettling the Premiſſes purſuant to his Agreement, being indebted at his Death by Bond and Judgment; and this Agreement was not in Writing, but was acknowledged by ſeveral Letters under the late Earl's Hand.

(*a*) Trin. 1713.

The Perſons, on whom theſe Remainders were to be ſettled, brought their Bill to have this Agreement executed, and had a Decree (*a*) for an Execution thereof before Lord Chancellor *Harcourt*, which Decree was affirmed by the Houſe of Lords.

And now the Queſtion before Lord Chancellor *Cowper*, was, Whether the Judgment Creditors of the late Lord *Winchelſea* ſhould be paid their Judgments, being *puiſne* to the Agreement.

Truſtee confeſſes a Judgment, this will not bind the Eſtate.

For the Plaintiffs it was objected, that from the Time that the late Earl entered into this Agreement, it being an Agreement made upon a valuable Conſideration, he [the late Earl] was but a Truſtee for the Uſes in the Settlement ſo agreed to be made as aforeſaid; and if a Truſtee confeſſed a Judgment or Statute, though at Law, theſe were Liens upon the Eſtate, yet, in Equity, they would not affect it; becauſe the Eſtate, in Equity, would not belong to the Truſtee, but to the *Ceſtuique Truſt*.

A. Articles to ſell an Eſtate to *B.* for a full Conſideration, and receives the Money, but before the Purchaſe gives a Judgment; this will not bind the Eſtate; *ſecus* if he makes a Mortgage to one who has no Notice.

That if one articled to buy an Eſtate, and paid his Purchaſe Money, and afterwards the Perſon, who agreed to ſell, acknowledged a Judgment or Statute to a third Perſon, who *had no Notice*, yet this Judgment ſhould not, in Equity, affect the Eſtate; becauſe from the Time of the Articles, and Payment of the Money, the Perſon agreeing to ſell would be only a Truſtee for the intended Purchaſor; which was admitted, and affirmed by the Lord Chancellor.

It was granted, That if in this Caſe Lord *Winchelſea*, or any other Perſon that had been a Truſtee in Poſſeſſion, had made a *Mortgage* of the Premiſſes *for a valuable Conſideration, and without Notice*, ſuch Mortgagee, in regard he might have pleaded his Mortgage, and would have been as a Purchaſor without Notice, ſhould have held Place againſt the intended Purchaſor, or *Ceſtuique Truſt*; for there the Money would have been lent upon the Title and Credit of the Land, and have attached upon the (*a*) Land; which would not be ſo in the Caſe of a Judgment Creditor, who (for ought appeared) might have taken out Execution againſt the Perſon, or Goods of the Party that gave the Judgment; and a Judgment is only a general Security, not a ſpecifick Lien upon the Land.

(*a*) Vide poſt *Brace* verſus *Ducheſs of Marlborough*, 2 Vol. 491.

Alſo it was urged, that as the Agreement bound the late Earl, ſo it ſhould bind all claiming under him; conſequently the Judgment Creditors of the late Earl could have no better Title than he himſelf had.

For which Purpoſe Mr. *Vernon* cited the Caſe of * *Burgh* verſus *Francis*, decreed by Lord Keeper *Bridgman*, and affirmed by Lord Chancellor *Nottingham*, where there was a defective Mortgage in Fee for 500 *l.* it being made by way of Feoffment *without Livery*, and after this, the Mortgagor confeſſed a Judgment to a third Perſon; nevertheleſs the Eſtate being in Equity ſpecifically

A. conveys an Eſtate by a Conveyance which is defective, (*viz.*) for want of Livery, *&c.* and after confeſſes a Judgment; this will not affect the Eſtate.

---

* Firſt heard by Lord Keeper *Bridgman*, and reheard by Lord Keeper *Finch*, *Mich.* 25 *Car.* 2. 1673.

cifically bound by the Mortgage, it was decreed, that the Mortgage ſhould be preferred to the Judgment, tho' at Law, the former being in Strictneſs void, the Judgment Creditor would have taken place.

(a) 2 Vern. 564.

So in the Caſe of *Taylor* verſus *Wheeler* (*a*), decreed by Lord Keeper *Cowper*, 11 *Nov.* 1706. One ſeiſed in Fee of a Copyhold made a Mortgage thereof to *J. S.* but the Surrender was not preſented at the next Court, by Means whereof it became in Law void; and afterwards the Copyholder, [the Mortgagor,] who had all along continued in Poſſeſſion, became a Bankrupt; and tho', on a Diſpute between the Mortgagee and Creditors, it was objected, that it was the Mortgagee's own Fault, that he did not procure the Surrender to be preſented, and that this was, (probably,) with an ill Intent, (*viz.*) to wrong the Lord of his Fine; that the Copyholder being in Poſſeſſion, and the viſible Owner of the Eſtate, this might, and in all Likelyhood did, induce his Creditors to truſt him, as thinking his Eſtate would be liable to their Debts; that it was reaſonable that all the Creditors of the Bankrupt ſhould come in equally, and the Mortgagee only for his Proportion, his Mortgage being void at Law, and conſequently liable to the Bankruptcy, and that Equality was the higheſt Equity: Yet it was decreed, on great Deliberation, that this Mortgage, tho' void at Law, was, notwithſtanding, an equitable Lien upon the Copyhold Eſtate, and ſhould be made good in Equity, and bind the Aſſignees of the Commiſſion of Bankruptcy, and all the Creditors.

A. ſurrenders a Copyhold by way of Sale or Mortgage, but the Surrender not preſented, and *A.* becomes a Bankrupt; this will bind the Eſtate in Equity.

On the other Side it was inſiſted, that Creditors were the Favourites of all Courts of Law, and much more in Equity; that ſince theſe Creditors now before the Court, had a Remedy at Law for their Debts, it would be inverting the proper Buſineſs of a Court of Equity, to defeat them of, inſtead of helping them to, their juſt

Debts, which, without the Interpoſition of Equity, they would recover.

That in the late Earl of *Pembroke*'s Caſe, upon his Marriage with the [now] Counteſs Dowager, it was agreed, ſhe ſhould have a Rent of 1500 *l. per Annum* Jointure; and the Method adviſed by Counſel for ſecuring it, was, by Demiſe and Redemiſe, (*viz.*) The late Earl demiſed his Manors and Lands in *Glamorganſhire* to the Counteſs's Truſtees for ninety-nine Years, who redemiſed the Premiſſes to the late Earl for ninety-eight Years, reſerving 1500 *l. per Annum* during the Counteſs's Life, to commence after the late Earl's Death, the Lands being of about double that Value; after which the late Earl of *Pembroke* died greatly indebted by Simple Contract; and tho' it was objected, that this Term of ninety-eight Years, being redemiſed to the late Earl as a Method only propoſed by Counſel to ſerve a particular End, ought, ſuch End being ſerved, to attend the Inheritance; and tho' it was (*a*) once ſo decreed in Lord Chancellor *Jefferey*'s Time, yet that Decree was afterwards (*b*) reverſed, and the Reverſal acquieſced under by the Heir of the late Lord *Pembroke*; for it being legal Aſſets, Equity ſhall never take from a Creditor, what, at Law, he is intitled to.

(*a*) 2 Vern. 52.

(*b*) 2 Vern. 213.

That the Creditors were now in Nature of Defendants, they coming in before the Maſter, and conſenting to be bound by the Decree of the Court; and the Plaintiffs were asking the Court to take away the Benefit of the Law from honeſt and juſt Creditors.

That this Caſe was not like that of a Truſtee *out of Poſſeſſion*; for the late Earl, who contracted theſe Debts by Judgment, was *in Poſſeſſion*; and as he was ſeiſed of the legal Eſtate in Fee, ſo was he alſo the *viſible*, as well as the *legal* Owner of the Eſtate; and, upon the Credit of this Eſtate might be ſuppoſed to have been truſted for this Money; and the Judgment Creditor might think himſelf ſafe by Means of the Land, and lend upon *that*.

That there was little Difference betwixt a Mortgage and a Judgment; and yet it had been admitted, that if one articled to ſell, and after received the Money, and then *mortgaged*, before he conveyed to the Purchaſor, the Mortgagee ſhould hold the Mortgage.

It might be granted, that in the Caſe cited of a Man's making a defective Conveyance, and becoming Bankrupt, the Creditors ſhould not avoid it, any more than the Bankrupt himſelf; becauſe the Creditors ſtood in the Bankrupt's Place, and (*a*) could do no more than he could have done himſelf.

(*a*) In *Jacobſon* verſus *Williams*, 383. & *Boſvile* verſus *Brander*, 459.

But that, in the principal Caſe, the *Plaintiffs* claiming under this Agreement were in Fault, that they did not make freſh Suit, but delayed it nine Years; whereas they ought to have come before for an Execution of this Agreement, which would (probably) have prevented theſe Creditors from lending their Money, or if they had taken a Security of the Premiſſes *pendente lite*, it would not have availed them.

Lord Chancellor *Cowper*: Articles made for a valuable Conſideration, and the Money paid, will, in Equity, bind the Eſtate, and prevail againſt any Judgment Creditor, meſne betwixt the Articles and the Conveyance; but this muſt be, where the Conſideration paid is ſomewhat *adequate* to the Thing purchaſed; for if the Money paid is but a *ſmall Sum*, in Reſpect of the Value of the Land, this ſhall not prevail over a meſne Judgment Creditor.

In the principal Caſe, the Conſideration was *not adequate* for the Counteſs Dowager of *Winchelſea*, with whom the Agreement was made, parted with *no Money*, having only made a conditional Surrender, in order for a Common Recovery; beſides, I know the Inducement with the Lords to affirm the Decree, was the Plaintiffs Propoſal to pay the Debts by Judgment and Bond. And the Decree intended to provide that the Settlement ſhould not prejudice the Creditors.

For which Reaſon, tho' that Clauſe was left out in the Decree below, yet ſince the Conſideration is not adequate, it ſhall not be ſo far regarded in Equity, as to bar a Judgment Creditor, who has a legal Lien upon the Eſtate.

DE
Term. S. Michaelis,
1715.

Caſe 67.

Gillet verſus *Wray*.

One by Will leaves an Annuity to his Grandaughter; but if ſhe marry with the Executors Conſent, then a Portion; ſhe marries, *ſans* Conſent, a Man worth nothing; Husband is not intitled to the Money, the having married with the Executors Conſent being a Condition precedent to the Gift of the Portion.

A Man by his Will leaves his Grandaughter an Annuity of 10 *l. per Annum* for Life, and afterwards, by a Codicil to his Will, declares, that "If "his Grandaughter ſhall marry with the good Liking "of his Truſtees, then ſhe ſhall have 150 *l.* in lieu of "the Annuity, and her Annuity to ceaſe.

The Grandaughter afterwards marries one worth nothing, and without the Conſent of any of the Truſtees.

Whereupon it was objected by Serjeant *Hooper*, that the Reſtraint of Marriage was only *in terrorem*, and that the Grandaughter, notwithſtanding her having married as above, ought to have the 150 *l.* Portion.

But the Lord *Cowper* decreed the contrary, ſaying, here was a Proviſion made either Way, and where the

Proviſion for the Child is in the Alternative, and there is a Condition precedent to the Gift of the Portion, (*viz.*) If *ſhe marries with Conſent, &c.* and that is not performed, and the Child is ſtill provided for, tho' not with the greater Portion, Equity in that Caſe, does not relieve.

Dagley verſus *Tolferry*.

Caſe 68.

Reports of Caſes in Equity 103. under the Name of *Dawley* verſus *Belfry*.

A. Having a Siſter who had four Infant Children, does by Will deviſe 100 *l.* a-piece to theſe Infant Children, mentioning no Time of Payment, and makes the Defendant Executor, and dies.

Payment to the Father as Guardian, of a Legacy given to a Child, ill; tho' the Teſtator by Parol on his Death-bed directed it.

It was proved in the Cauſe, that the Teſtator, on his Death-bed, gave *Directions, that the Executor ſhould pay theſe Legacies to the Father of the Infants, that he might improve the Money for their Benefit*

Accordingly the Defendant the Executor actually paid theſe four Legacies to the Father.

Several Years after, the youngeſt Child coming of Age, there was an Account betwixt the Father and the youngeſt Son, and it appeared the Father was indebted to this youngeſt Son in 200 *l.* (including the 100 *l.* Legacy) and that the Son paſſed the Accounts, and accepted his Father as Debtor for the ſame, which was urged, as an Agreement to the antecedent Payment that had been made of this Legacy to the Father.

Alſo after the ſaid youngeſt Son came of Age, he never made any Demand againſt the Defendant the

Executor; ſo that there was an Acquieſcence for near fifteen Years.

It happened afterwards, that the youngeſt Son being a Bankrupt, the Commiſſioners made an Aſſignment of the Bankrupt's Effects to the Plaintiff, in Truſt for himſelf and the reſt of the Creditors, and the Plaintiff thereupon brought a Bill againſt the Defendant the Executor for this 100 *l.* Legacy, and had a Decree for the ſame, in regard the Payment of the Legacy to the Father and Guardian was ill.

And this Decree being made by Sir *John Trevor* Maſter of the Rolls, an Appeal was brought before Lord Chancellor *Cowper,* who affirmed the Decree; for that (as he ſaid) if the ſame were reverſed, it might incourage Payments to Parents and Guardians, in Wrong of Infant Children; but it was thought a * hard Caſe, and the Depoſit ordered to be divided.

Caſe 69.

Day verſus *Trig*. Before Mr. J. *Tracy* in the Abſence of Lord Chancellor.

One deviſes all his Freehold Houſes in *A.* and hath none but Leaſehold Houſes there, the Leaſehold ſhall paſs. *Secus* in a Grant.

ONE deviſed all his Freehold Houſes in *Alderſgate-ſtreet, London,* to the Plaintiff and his Heirs, and in Fact the Teſtator had no Freehold Houſes there, but had Leaſehold Houſes there.

2 Decreed

---

* The Teſtator's having directed the Payment of the Legacy to be made to the Father of the Infant, makes the Decree carry with it a great Appearance of Hardſhip; for which Reaſon, and becauſe this Particular is omitted in the Book referred to in the Margin, the Regiſter's Book has been ſearched, from whence it appears, that the Caſe is here rightly ſtated, and that great Streſs was laid on this Circumſtance in the Petition of Appeal.

Decreed by Mr. J. *Tracy*, that tho' in a *Grant* of all one's Freehold Houſes, Leaſehold Houſes could not paſs; and that in the Caſe of a *Will*, had there been any Freehold Houſes to ſatisfy the Will, the Leaſehold Houſes ſhould not have paſſed; yet the plain Intention of the Teſtator in the principal Caſe being to paſs ſome Houſes, and he having no Freehold Houſes there, the Word [Freehold] ſhould rather be rejected, than the Will be wholly void: And the Leaſehold ſhould paſs; and that the Suit was proper in Equity, ſince the Leaſehold Houſes (being Chattels) could not paſs by the Will without the Aſſent of the Executor, which Aſſent he was compellable to give in Equity.

Goſs verſus *Tracey*.

Caſe 70.

Lord Chancellor Cowper.

2 Vern. 699.

A. By his Will had deviſed his Land to his Mother in Fee, and the Mother was afterwards told by *J. S.* that this Will would not be good, but ought to be *guarded*, (as he called it,) and that he would make another Will for the Teſtator, which he would take Care ſhould be *ſufficiently guarded*.

Accordingly *J. S.* drew the Will; which was ſo drawn, that *A.* thereby gave the Land to his Mother for *Life only*, Remainder to *J. S.* in Fee.

The Mother, on the Death of *A.* brought a Bill to eſtabliſh the firſt Will, and examined the now Plaintiff as a Witneſs to prove the ill Practices made uſe of by *J. S.* in obtaining the ſecond Will; after which, and before the Hearing of the Cauſe, the Mother died, having made her Will, and given a Rent-Charge with a Clauſe of Diſtreſs, out of the Eſtate, to the Plaintiff, and deviſed the Lands ſo charged to others; and there were divers Witneſſes examined to prove *A.* the firſt Teſtator *Non compos*, when he made his ſecond Will.

A Will of Land may be good at Law, as being well executed, and yet ill in Equity, as if obtained by Fraud.

Lord Chancellor: A Will, tho' good at Law, may yet be ſet aſide in Equity for (*a*) Fraud; as if *A.* ſhould agree to give *B.* Bank-Bills to the Amount of 1000 *l.* in Conſideration that *B.* would make his Will, and thereby deviſe his Lands to *A.* and accordingly *B.* does make ſuch a Will, and *A.* gives *B.* the Bank-Bills, but thoſe Bank-Bills proved to be forged; this, tho' a good Will at Law, ſhall nevertheleſs be avoided in Equity by the Teſtator's Heir, for the Fraud.

In like Manner, if *A.* had deviſed his Lands to his Mother in Fee, and afterwards *J. S.* the Defendant had told *A.* the Teſtator, and not the Mother, (as in the principal Caſe,) that the Will was a void Will for want of its being well guarded; and that he would make another Will for the Teſtator, that ſhould be effectually guarded; and accordingly he had made another Will for the Teſtator, whereby the Eſtate had been deviſed to the Mother for *Life only*, the Remainder to *J. S.* (the Defendant) in Fee; this would be a good Will in Law, if atteſted purſuant to the Act of Parliament, but would be ſet aſide in Equity for the Fraud; but as to the Evidence of the Teſtator's being *Non compos*, that is intirely at Law, and to be tried there.

Caſe where the Plaintiff himſelf a good Witneſs: As where a Witneſs is examined who at that Time is diſintereſted, but afterwards becomes intereſted and Plaintiff in the Cauſe, his Depoſitions ſhall be read.

Secondly, Upon offering the Depoſitions of the Plaintiff to be read, it was objected, that the Plaintiff's own Depoſitions could not be read, foraſmuch as he was a Party claiming under the Will in Controverſy,

---

(*a*) Et vide in 1 *Chan. Rep.* (laſt Edit.) 12, 66. Inſtances of a Will of Land being ſet aſide in Equity for Fraud.

verſy, and ſo could not be a Witneſs for the Will; and Sir *Joſeph Jekyll* cited *Tilly*'s Caſe (*a*), where one was examined as a Witneſs, who at that Time was no ways concerned in Point of Intereſt, but afterwards became intereſted, and at a Trial at Bar in this Caſe, the Judges of *C. B.* ſent a Judge to the Court of *B. R.* for their Opinion in the Point, who held, that the Depoſitions could not be read; for that the Witneſs himſelf was living, and he himſelf could not have been a Witneſs at that Time *Vivâ voce*, becauſe he was then intereſted.

(*a*) Salk. 286.

But *Lord Chancellor*, in the principal Caſe, becauſe the Witneſs was a good Witneſs, and diſintereſted at the Time of the Depoſition taken, and this being in the Nature of a Bill of Revivor, to have the Benefit of the Proceedings in which the Plaintiff was examined, admitted (*b*) the Plaintiff's own Depoſitions to be read.

After which, the Court directed an Iſſue in *Middleſex*, where the Will was made, (tho' the Lands lay in *Shropſhire*,) to try, whether the Will, by which the Lands in Fee were deviſed to the Wife, was the laſt Will of the Teſtator *A.*

Upon this Occaſion Serjeant *Hooper*, *obiter*, put the following Caſe, as having happened in his Experience, *viz.* *J. S.* was the ſurviving ſubſcribing Witneſs to a Bond, and afterwards the Obligee in the Bond made *J. S.* the ſurviving Witneſs, his Executor; in an Action

Surviving Witneſs to a Bond is made Executor of the Obligee; in an Action brought by him on the Bond, Evidence ſhall be admitted to prove the Plaintiff's Hand as a Proof of the Bond.

(*b*) See 2 Vern. 472. *Callow* verſus *Mime*; Where a Witneſs was examined before the Hearing while ſhe was intereſted, but after the Hearing ſhe releaſed her Intereſt, and was examined again before the Maſter, and her Depoſitions before the Maſter were allowed to be read.

brought by *J. S.* the Executor, upon this Bond, the Court allowed Evidence to prove the Plaintiff's Hand to the Bond, he being diſabled himſelf to give Evidence, as much as if he was dead.

Alſo in the principal Caſe it was declared, that a Grantee, when he appears to be a bare Truſtee, is a good Evidence to prove the Execution of the Deed to himſelf.

Caſe 71.

Seale verſus *Seale*.

Preced. in Chan. 421.

One deviſes all his Money in the Government to be laid out in the Purchaſe of Land of 3 or 400 *l.* *per Annum*, to be ſettled on the eldeſt Son, and the Heirs Male of his Body; Remainder to the ſecond Son, and the Heirs Male of his Body, *&c.* and deviſes the reſt of his perſonal Eſtate to his eldeſt Son, and the Heirs Male of his Body; Remainder to his ſecond Son, *&c.* the perſonal Eſtate cannot be intailed, but the whole veſts in the eldeſt Son.

ONE deviſed that all his Money in the Government-Funds ſhould be laid out in a Purchaſe of Lands of 3 *or* 400 *l.* a Year, and ſettled on his eldeſt Son *A.* and the Heirs Male of his Body, Remainder to his ſecond Son *B.* and the Heirs Male of his Body, *&c.* and bequeathed the reſt of his perſonal Eſtate to *A.* and the Heirs Male of his Body, Remainder over, in the ſame Manner.

Where 3 or 400 *l. per Annum* is directed to be purchaſed, the Court will take it in the largeſt Senſe, and conſtrue it to be 400 *l. per Annum.*

Lord Chancellor: It is clear, the perſonal Eſtate cannot be intailed, but the whole Property thereof veſts in *A.* as to the other Deviſe, I will conſtrue it in the moſt liberal Senſe; and it being directed that Lands of 3 *or* 400 *l. per Annum* ſhould be purchaſed, it ſhall be 400 *l. per Annum.*

Lands directed to be purchaſed and conveyed to *A.* and the Heirs Male of his Body, Remainder to *B.* Equity will not decree it to be ſettled to *A.* for Life, Remainder to his firſt, *&c.* Sons.

And tho' it was inſiſted, that this being the Caſe of Money directed to be laid out in Land, was to be conſtrued

2 like

like Marriage-Articles, where Lands are covenanted to be ſettled upon the Huſband and the Wife, and the Heirs Male of the Body of the Huſband, in which Caſe the Court would order a ſtrict Settlement, *viz.* to the Father for Life, Remainder to the firſt, *&c.* Son, to the Intent that the Huſband might not bar it. And for the ſame Reaſon ſhould do ſo here :

Yet *Lord Chancellor* ſaid this Caſe differed : For that in Marriage Articles the Children are conſidered as (*a*) Purchaſors; but in the Caſe of a Will, (as this was) where the Teſtator expreſſes his Intent to give an Eſtate-Tail, a Court of Equity ought not to abridge the Bounty directed by the Teſtator.

(*a*) Vide ante 145, in *Bale* verſus *Coleman.*

Howel verſus *Price et econ'.*

Caſe 72.

A. In Conſideration of 300 *l.* made a *Welch* Mortgage, (*viz.*) a Conveyance in Fee of 52 *per Ann.* in *Wales*, under a Proviſo to be void, if *A.* his Heirs or Aſſigns ſhould pay to the Mortgagee or his Heirs 300 *l. on any Michaelmas Day*, giving ſix Months Notice, and the Mortgagee to have the Rent which ſhould be then in Arrear ; but there was no Bond, or Covenant to pay the Money.

2 Vern. 701. Preced. in Chan. 4. Mortgage in Fee is made redeemable on Payment of 300 *l.* and Intereſt upon any *Michaelmas* Day, on ſix Months Notice ; Mortgagor dies, having deviſed his Perſonal Eſtate to his Wife ; Perſonal Eſtate is liable to pay the Mortgage.

The Mortgagor continued in Poſſeſſion, and payed the Intereſt during his Life, and by his Will gave ſome Legacies, and deviſed the Surplus of his Perſonal Eſtate, Subject to his Debts, to his Wife and Daughter, whom he made Executors, and died. Upon which, the Daughter dying ſoon after, the Heir brought this Bill againſt the Widow the ſurviving Executrix, to compel the Applying of the Perſonal in Exoneration of the Real Eſtate.

Sir *Joſ. Jekyll pro' Quer'* inſiſted, that this Mortgage was Money borrowed, and a Debt, of which the Mortgagor's paying Intereſt was an Evidence; that the (*a*) Heir was favoured in Equity, beyond an Adminiſtrator, or an Executor; for if a Man were to article to purchaſe an Eſtate in Fee and die, the Heir ſhould compel the Executor to lay out the Money, and ſhould take the Land when bought; and if Equity would favour the Heir, ſo far, as to help him to a *new* Eſtate, *a Fortiori*, in this Caſe, would it interpoſe, to *preſerve* to him the *old* one; that the Mortgagor's continuing in Poſſeſſion ſhewed this was only a Debt upon the Eſtate; and if the Mortgagee had entered, and received the Profits, he muſt have been accountable, and they would have gone towards leſſening the Debt; nay, and notwithſtanding the Covenant, that the Mortgagee ſhould have the Arrears of Rent due on the *Michaelmas* Day, that the Money ſhould be paid in, yet Equity would not allow that, but they would go towards Satiſfaction of the Mortgage Money; ſo if the Mortgage were evicted, or were not of Value to pay, or anſwer the Mortgage Money, Equity would make the Mortgagor anſwer the Surplus.

(*a*) In *Lingen* ver. *Sowray*, 174. poſt *Hayter* ver. *Rod*, 364. and *Edwards* ver. *Counteſs of Warwick*, 2 Vol. 175.

Beſides, the very Loan of the Money created a Debt in Equity, and the Over-value of the Eſtate, (*viz.*) 52 *per Ann.* mortgaged for 300 *l.* proved it to be ſo beyond all Contradiction.

Mr. *Vernon cont.* This is a Conditional Sale betwixt the Mortgagor and Mortgagee, that the Mortgagee ſhould have the Land, until the Mortgagor, or his Heirs, ſhould pay the Money; but ſtill it was in the Election of the Mortgagor, whether ever he would pay the Money, and the Mortgagor was no way compellable to pay it, any more than a Pawner is bound to pay the Money for which the Pawn was made, neither will any Action of Debt lie for this Money.

I admit, if the Mortgage were evicted, or the Land not of Value, the Mortgagee might, in Equity, recover the Money againſt the Mortgagor; but that would be becauſe of the Fraud that the Mortgagor would, in ſuch a Caſe, be guilty of; it may be reſembled to the Caſe of a Father's mortgaging his Land (*a*) and dying, whereupon the Son enters, though this be a Debt, and an Incumbrance on the Son's Eſtate, when the Equity of Redemption deſcends to him, yet, as it was never the Son's Debt, the Son's perſonal Eſtate ſhall not be applied in Exoneration of ſuch Mortgage.

(*a*) Salk. 450. & vide poſt in *Evelyn* verſus *Evelyn*, 596.

Lord Chancellor asked, whether there had been any Precedent in this Caſe, and ſaid, that here did not appear to be any Contract either expreſſed, or implied, for the Payment of this Mortgage Money, nor was the Mortgagor any ways compellable in his Life-time to pay it; and if ſo, why ſhould his Executors? That the Exonerating of the Real out of the Perſonal Eſtate, was the Applying one Man's Eſtate to the Clearing of another's; for which he could ſee no Reaſon. *Sed Adjourn.* for further Conſideration.

Where Portions are charged on Land, whether the Heir ſhall compel the Perſonal Eſtate to diſcharge it.

It ſeems Sir *Thomas Powis* (as *Amicus Cur.*) informed the Court, that where Portions were charged upon an Eſtate, in the common Manner of Settlements, the Perſonal Eſtate had been decreed to exonerate the Land of theſe Portions, though there never were any Covenants for the Payment of them; but Mr. *Vernon* denied that he ever knew of any ſuch Decree.

(*a*) Afterwards, this Caſe coming on again to be argued, Lord Chancellor ſeemed to be ſtrongly of Opinion, that the Perſonal Eſtate ſhould be applied in Eaſe and Exoneration of the real Eſtate.

1*ſt*, For that the Father's Will had ſaid, that his Executors ſhould, *by his perſonal Eſtate, pay and levy his Debts.*

And if (though the Will were ſilent) on the Teſtator's dying indebted, the Perſonal Eſtate ought to be applied to pay the Debts, in Eaſe of the real Eſtate, *a fortiori* muſt it be ſo, when the Will was expreſs that all the Debts ſhall he paid thereout.

2*dly*, This 300 *l.* Mortgage Money was a Debt, for ſo is all Money borrowed; indeed it was a Debt of a ſpecial Nature, and for which there was a particular Remedy; the Remedy, in this Caſe of a Mortgage, being not by *Mutuatus* at Law, or by Bill in Equity, but ſtill it was a plain Remedy, (*viz.*) by Ejectment to recover the Poſſeſſion on Default of Payment.

3*dly*, If in this Caſe the Mortgagee had been in Poſſeſſion, it would not have made it leſs a Debt, ſince the Creditor would thereby have had his Remedy in his own Hands.

4*thly*, It was ſuch a Debt, as the Mortgagor took great Care that he, his Heirs or Aſſigns might at any Time be at Liberty to pay off.

(*a*) *Lunæ* 28. *Octob.* 1717. On the Equity reſerved after the Trial of an Iſſue that had been directed by the Court.

5thly, The running on of Intereſt, and its carrying Intereſt, was a Proof of its being a Debt, and the Proviſo ſaying, that if the Mortgagor his Heirs or Aſſigns ſhould pay the 300 *l.* and *the Rent* or *Arrear of Rent*, &c. in this Caſe by the Word [Rent] was to be underſtood the Intereſt or Profit of the Money, and what the Money yielded.

Laſtly, he ſaid, from hence it plainly appeared to be a Debt, *viz.* that in Caſe a Mortgagee died, and the Mortgagor came to redeem, he ſhould pay the Money to the Executor, and not to the Heir of the Mortgagee, though it was a Mortgage in Fee, it being Money ſecured by, and due upon, Land.

Wherefore, upon the whole, his Lordſhip thought it a ſtrong Caſe in Favour of the Heir, and decreed accordingly.

Waring verſus *Danvers*.

Caſe 73.
At the Rolls.
Executors, in Equity, as well as at Law, may prefer any Creditor in equal Degree, or, after an Action at Law brought by one Creditor, may confeſs Judgment to another.

THE Plaintiff was a Simple-Contract Creditor of *J. S.* the Teſtator, for 40 *l.* for Goods ſold and delivered, and filed his Original againſt the Defendant the Executor, in order to recover his Debt; and there being ſeveral other Simple-Contract Creditors, they offered the Plaintiff to come in for his Proportion of his Debt with the other Simple-Contract Creditors; but the Plaintiff, having firſt filed his Original, inſiſted upon being paid his whole Debt, in Preference to the reſt.

Upon which, the Executor and the other Simple-Contract Creditors entered into Articles, agreeing, that firſt the Executor ſhould be paid his Debts, and in the next place, that all the other Simple-Contract

Creditors ſhould equally ſhare the Aſſets betwixt them excluſive of the Plaintiff; and in order to bar the Plaintiff at Law, the Executor gave Judgment in the ſeveral *Quantum Meruits* brought by the other Simple-Contract Creditors, for the ſeveral Sums of Money which were laid as the Damages in the Declarations, without aſcertaining the Damages by Writ of Enquiry; but Care was taken, that thoſe Damages laid in the ſeveral Declarations ſhould not exceed the real Debt.

And on a Bill brought by the Simple-Contract Creditor, who was thus excluded by the Articles between the Defendant the Executor, and the other Creditors; and all this Matter being diſcloſed by the Anſwer,

1*ſt*, It was agreed, that both in Law, and Equity, an Executor might retain for his whole Debt when in equal Degree.

Next it was inſiſted upon by Mr. *Vernon*, that as an Executor might prefer himſelf, ſo might he prefer any other Creditor in equal Degree.

It was true, after the Commencement of an Action, an Executor could not pay another Creditor, before ſuch other Creditor had recovered Judgment; but ſtill the Executor was at Liberty to confeſs ſuch Judgment as he had done here, and he might do it in ſuch Manner as here was done, *viz.* by confeſſing Judgment for the Damages laid in the Declaration; and if this was for more than the juſt Debt, the Plaintiff at Law might reply, that ſuch Judgment was not *pro vero & juſto debito*; that in the Lord *Orford*'s Caſe (*a*) in the Houſe of Lords, upon an Appeal from a Decree in Chancery, it was adjudged, that an Executor, in Caſe of legal Aſſets, might give Judgment to any one Creditor, in Preference to another; and that though

(*a*) Preced. in Chan. 188.

though in the Caſe of *Joſeph* and *Mott* (*a*) it was decreed, that an Executor, pending an Action at Law, or *Bill in Equity*, could not confeſs a Judgment to another, yet that Caſe was cited in this of Lord *Orford*'s in the Houſe of Lords, but did not prevail, and that Lord *Orford*'s Caſe had ſettled this Point.

(*a*) Prec. in Chan. 79.

That, beſides the Authority above mentioned, the Reaſon of the Thing was very ſtrong, *viz.* that whereever a Creditor could gain an Advantage at Law, Equity ſhould not deprive him of it; for all Creditors had but an equal Equity, and therefore where one of them had got an Advantage at Law, he ought to keep it. *Vigilantibus Jura ſubveniunt.*

Cur. If the Plaintiff deſires it, I will ſend it to the Maſter to ſee, whether the Judgments confeſſed to the other Creditors be for more than their real Debts; but in this Caſe, the Plaintiff not thinking it worth his while, the Court diſmiſſed the Bill without Coſts, it being ſo hard a Caſe; but afterwards, on Conſideration, the Maſter of the Rolls gave Coſts, and the Decree, on Appeal, was affirmed by the Lord Chancellor.

Rawlins verſus *Powel.*

Caſe 74.

Executor has a Legacy, and no expreſs Diſpoſition of the Surplus; on a Bill brought by the next of Kin for a Diſtribution, the Executor anſwers, and waves the Benefit of the Surplus by Miſtake of the Law in that Point; denied to amend his Anſwer, though he proved the Teſtator intended he ſhould have the Surplus.

A. And *B.* had been Fellow Apprentices, and *A.* had a great Friendſhip for *B.* to whom he owed, upon an open Account, Monies computed to be upwards of 300 *l.* and being a Bachelor, but having Brothers and Siſters, made his Will giving a Legacy of 500 *l.* to *B.* and alſo Legacies to his Brothers and Siſters, and appointed *B.* Executor, without expreſsly diſpoſing, by his Will, of the Surplus of his perſonal Eſtate; ſoon after which he died.

The Brothers and Siſters, as next of Kin to the Teſtator, brought a Bill againſt *B.* the Executor, alledging, that he was but a Truſtee, as to the Surplus of the Perſonal Eſtate, there being no Diſpoſition of it, and he having an expreſs Legacy. Alſo inſiſting, that the Legacy of 500 *l.* ſhould be deemed a Satisfaction of the Debt which *A.* owed to *B.*

The Executor put in an Anſwer, by which he *admitted himſelf accountable for the Surplus*, but inſiſted, that he ought to have the Legacy, beyond his Debt.

But afterwards, underſtanding, that ſome Reſolutions ſubſequent to the Caſe of *Foſter* and *Munt*, (*viz.*) in the (*a*) Ducheſs of *Beaufort*'s Caſe, and that of *Ball* and *Smith*, had allowed, that though there was an Expreſs Legacy given to the Executor, and no Deviſe of the Surplus to him, yet the Executor ſhould, on the particular Circumſtances of the Caſe, have ſuch Surplus, he prayed, that he might amend his Anſwer; but was denied by (*b*) the Maſter of the Rolls.

(*a*) Vide ante 114.

(*b*) Sir *John Trevor*.

And on hearing the Cauſe, his Honour decreed the Legacy to the Executor over and beyond the Debt, but ordered, that, having waved the Surplus by his Anſwer, he ſhould account for it to the next of Kin, though there was ſtrong Proof that the Teſtator intended the Surplus to the Executor, and had directed the Scrivener to inſert in his Will a Beque ſt thereof to him; but that the Scrivener ſaid this was unneceſſary, for that the Executor would take this Surplus (*c*) of Courſe.

(*c*) Vide Lady *Gainsborough*'s Caſe cited ante 9, & 116.

From this Decree the Plaintiffs appealed to the *Lord Chancellor Cowper*, where it was urged for the Appellants, that this Legacy muſt go in Satisfaction of the Debt; that every one muſt be juſt before he is bountiful; and that it had been decreed, where a Father was bound to give a Portion with his Child, and afterwards by his Will gave a Legacy to ſuch Child, of as great, or greater Value, than the Portion, this ſhould be (even in the Caſe of a Child) a Satisfaction of the Portion; and they cited the Maxim in the Civil Law, *Debitor non præſumitur donare.*

Legacy ſhall be taken in Satisfaction of a Portion.

Lord Chancellor: The Nature and Circumſtances of this Debt are material; for if it was upon an open and running Account, betwixt the Teſtator and his Executor, (as is inſiſted by ſome of the Counſel) ſo that it might not be known to the Teſtator, whether he did owe any Money to the Executor, or not; then the Teſtator could not intend the Legacy to be in Satisfaction of a Debt, which he did not know that he owed, any more, than a Legacy can be a Satisfaction of a Debt contracted (*a*) after the making of the Will; and this Caſe differs much from that of a Bequeſt from a Parent to a Child, of a Legacy which was as great, or greater, than the Portion which the Father was bound to give ſuch Child; for, in that Caſe, the Intent of ſecuring the Portion was only that the Child might be provided for by the Parent; which End was anſwered by the Parent's giving an Adequate, or greater Legacy to the Child by his Will; and then ſuch Legacy might be taken to be in Exoneration of the Land, which (probably) was before charged with it. But let it go to the Maſter to ſtate how this Debt did ariſe, with all the Circumſtances of it.

Legacy not taken in Satisfaction of a Debt upon an open Account, where it was uncertain on which Side the Ballance was.

(*a*) Salk. 508. & poſt *Chancey*'s Caſe, 408.

With Regard to the other Point of the Surplus, his Lordſhip ſaid, upon the Plaintiff's petitioning to rehear, the Cauſe was open as to the whole, and every Part of it with Reſpect to the Defendant; while, in relation to the Plaintiffs, it was only open as to thoſe Parts of it complained of in the Petition; that it would do very well, if this Point concerning the Surplus were once ſettled, and certain, either way; yet in this Caſe, where the Defendant himſelf had, by his Anſwer, waived any Title to the Surplus, he would not, againſt his own Conceſſion, decree it for him.

But in *Eaſter* Term 1718. this Cauſe coming on upon the Maſter's ſpecial Report, Lord Chancellor *Parker* ſaid, he could not but incline to help the Defendant, who by Miſtake, or Miſadvice only of his Counſel, was in a Way of loſing his Right. Therefore, if the Plaintiffs would bind the Defendant by his Anſwer, from taking the Surplus as Executor, they ought to take it upon the Terms in the Anſwer, (*viz.*) the Executor waives the Surplus, but inſiſts on his Debt and Legacy; and conſequently decreed that the Defendant, in this Caſe, ſhould have both his Debt and Legacy; even tho' the Legacy appeared, by the Maſter's Report, to be much greater than the Debt.

Caſe 75.

Anonymus.

In ſome ſpecial Caſes the Anſwer of one Defendant may be read againſt the other.

REgularly, the Anſwer of one Defendant ſhall not be made uſe of as Evidence againſt another Defendant; but one Defendant ſaying by his Anſwer, that he was much in Years, and could not remember the Matter charged in the Bill, but that *J. S.* was his Attorney, and tranſacted this Matter, and *J. S.* the

2 Attorney

Attorney being made a Defendant, and giving an Account of the Matter:

Here, upon a Motion for an Injunction, Lord *Cowper* ſaid, theſe Words in the firſt Defendant's Anſwer amounted to a referring to the Co-Defendant's Anſwer, and for that Reaſon the Attorney's Anſwer ought to be read, and accordingly was read againſt the firſt Defendant.

Anonymus.

Caſe 76.

Injunction upon an Attachment or *Dedimus*, &c. does not ſtay Proceedings in the Spiritual Court, without ſpecial Order.

AN Injunction upon an Attachment, or a *Dedimus*, or upon the Defendant's praying Time, does not extend to ſtay Proceedings in the Spiritual Court, as it does to ſtay Proceedings at Law; ſo that whenever Proceedings in the Spiritual Court are to be ſtayed, it is to be moved ſpecially. *Quære*, whether the ſame Rule does not hold with Regard to Proceedings in the Court of Admiralty.

DE
Term. S. Hillarii,
1715.

Caſe 77.

Sir John Trevor *Maſter of the Rolls.*

Cook verſus *Oakley & al'.*

One being on Ship-board, and intitled to Part of a conſiderable Leaſehold Eſtate by the Death of his Father, which he did not know he had a Right to, makes his Will at Sea, and deviſed to his Mother (if living) his Rings, and makes *A.* his Executor, and deviſes to *A.* his red Box, and all Things not before bequeathed; this ſhall not paſs the Leaſehold Intereſt, or what the Teſtator did not know he was intitled to, but ſhall be reſtrained to Things *ejuſdem generis.*

GILBERT *Cook*, one of the five Children of *Benjamin Cook*, went beyond Sea in his Father's Life-time; after which, his Father, being poſſeſſed of a conſiderable Leaſehold Eſtate, deviſed two Thirds of his ſaid Eſtate to his five Children equally, and one Third to his Wife, and died; then the Wife died, having deviſed her Third to her Children equally.

Afterwards *Gilbert* the Son, having been beyond Sea many Years, and being on Ship-board, made his Will, and gave to his Mother (if alive) his Gold Rings, Buttons, and Cheſt of Cloaths, and to his loving Friend, the Defendant *Francis Goſtlin*, (who was on board with him,) his red Box, Arrack, *and all Things not before bequeathed*; and made him ſole Executor.

It appeared in the Cauſe, (and indeed by *Gilbert*'s Will,) that he did not know that his Mother was actually dead, and conſequently could not know what Eſtate was given him by his Mother; and tho' he knew his Father was dead, yet he was not informed what Will his Father had made, or what his Father had left, or whether he was intitled to any Part of his Eſtate.

And it was inſiſted on Behalf of the Teſtator's Brothers and Siſters, that here being an expreſs Legacy given to the Executor, (*viz.*) the Teſtator's red Box and Arrack, it could not be preſumed, but that if the Teſtator had alſo intended to give him his Share in the Leaſehold Premiſſes, he would have mentioned them; and if he did not know he had any ſuch Share in the Leaſehold Eſtate, then it was plain he could not intend to diſpoſe of it; and the Deviſe of all Things not before bequeathed, could not be intended to paſs the Leaſehold Intereſt, or real Chattels, but mere perſonal Things only; ſuch as were on board the Ship, or Things *ejuſdem generis* with thoſe above-mentioned; that it was to be intended he did not know that he was intitled to any Part of this Leaſehold Eſtate of his Father, in regard, he would (in all Probability) have given ſome Share thereof to his Mother, to whom he gave, and for whom he ſeemed to have deſigned, the moſt valuable Part of his Subſtance; for he gave to her his Rings, Buttons, and Cheſt of Cloaths. It was alſo conſiderable, that *Goſtlin* was a meer Stranger; and on the other Hand, the Teſtator had ſo near Relations as Brothers and Siſters, and that the Will had been made on Ship-board.

The Maſter of the Rolls decreed, that *Goſtlin* the Executor, ſhould be but a Truſtee, as to the Surplus, for the Teſtator's Brothers and Siſters; but that with Reſpect to the Buttons, Rings, *&c.* given to the Mother, they were lapſed Legacies, by Reaſon of the Mother's dying in the Teſtator's Life-time, and ſhould therefore fall to the Executor.

Subſequent Marriage, and having Children, conſtrued a Revocation of a Will.

Alſo upon this Occaſion his Honour mentioned a (*a*) Caſe, that he remembered to have been adjudged, where a Man made a Will, and appointed *J. S.* (who was no Relation,) his Executor; afterwards he went beyond Sea, where he became Governor of one of the Plantations, and ſent over for an *Engliſh* Woman of his Acquaintance, whom he married and had Children by, and died without any actual Revocation of his Will; yet it was determined, that this total Alteration of the Teſtator's Circumſtances, was an implied Revocation of the Will; and in Affirmance of this, Sir *Joſeph Jekyll* cited this Caſe from the Civil Law, *Pater credens filium ſuum eſſe mortuum alterum inſtituit hæredem; filio domi redeunte, hujus inſtitutionis vis eſt* (*b*) *nulla.*

(*b*) Vide Cic. de Oratore, Cantab. Ed. pag. 69, 102. & Dig. L. ult. de Hæred. Inſt.

Dyoſe

(*a*) This Caſe appears, in another Part of our Author's Reports, to have been that of *Eyre* verſus *Eyre*, which the Maſter of the Rolls (Sir *John Trevor*) ſaid was reported to him by *Treby* C. J. and ſome eminent Civilians. See alſo the Caſe of *Lug* verſus *Lug*, Salk. 592. where a Will of perſonal Eſtate was preſumed to be revoked by Alteration of Circumſtances. But more particularly the Caſe of *Brown* verſus *Thompſon*, heard at the Rolls 8 *Dec.* 1701. where Sir *John Trevor* held, that a ſubſequent Marriage, and having Children, was a Revocation of a Will of *Land*; and diſmiſſed the Bill of the Legatees claiming Legacies charged on the Eſtate by ſuch Will. I find indeed in the Regiſter's Book, that Lord Keeper *Wright*, in the *July* following, reverſed the Order of Diſmiſſion, and decreed the Payment of the Legacies; but in the Abridgment of Caſes in Equity, Page 413. it is ſaid, that it was on the particular Circumſtances of that Caſe; and that my Lord Keeper allowed the Statute of Frauds and Perjuries did not extend to an implied Revocation.

Dyoſe verſus *Dyoſe*.

Caſe 78.

Lord Chancellor Cowper.

A reſiduary Legatee, on a Deficiency of Aſſets, allowed to come in *pari paſſu* with the other Legatees, by Reaſon of the ſpecial Circumſtances of the Caſe.

MR. *Dyoſe* of *Gray's Inn* had a Wife and three Sons; his real Eſtate was ſmall, but he had a perſonal Eſtate amounting to near 20000 *l.* and by his Will (*inter al'*) gave 3000 *l.* a-piece to his two younger Sons, and the Surplus to his eldeſt Son, and made his Wife Executrix and Guardian to his Children, who were then all Infants, and ſhortly after died.

On his Death, it appeared, that the Bulk of his perſonal Eſtate conſiſted of few *Items*, (*viz.*) In Eaſt-India Stock, Bank-Stock, and Monies in the Government Funds.

Afterwards the Wife married one *Lyndall*, who converted great Part of Mr. *Dyoſe*'s perſonal Eſtate, and went beyond Sea; and the two younger Sons bringing their Bill in this Court for their 3000 *l.* Legacy, it was urged that it would be hard on the eldeſt Son, to whom the Father intended to be moſt bountiful, if he muſt be poſtponed to his two younger Brothers, by their being firſt paid their Legacies of 3000 *l.* a-piece with Intereſt, before the eldeſt Son ſhould come in for any Thing.

Lord Chancellor: Let the Maſter take an Account of what was the clear perſonal Eſtate of the Teſtator *Dyoſe* at his Death; and this perſonal Eſtate lying in a narrow View, and conſiſting chiefly but of few *Items*:

His Lordſhip was of Opinion, that the Teſtator *Dyoſe*, muſt, at the making of his Will, know what

his

his Surplus would amount unto, after his Debts and Legacies paid; and that he meant this Surplus as a Legacy to his eldeſt Son: Whereupon the Court declared, it ought to be looked upon as ſuch; and directed, that the Maſter ſhould compute Intereſt, as well for what was the Surplus of the Teſtator's perſonal Eſtate at his Death, for the eldeſt Son, as for the two Legacies of 3000 *l.* a-piece to the two younger Sons; and if any of the three Sons had received any Part of the perſonal Eſtate of the Father, the other two were, in the firſt place, to receive as much, ſo as to put them all upon an equal Foot; and afterwards all the three Sons were to receive *pari paſſu*, in reſpect of the Value of the Surplus given to the eldeſt Son, which was to be taken as a Legacy, and in regard to the Legacies of 3000 *l.* each to the two younger Sons.

Caſe 79.
Lord Chancellor Cowper.

2 Vern. 730.

Grantee of Fee-Farm-Rents has the ſame Power of Diſtreſs as the King had; and ſo may diſtrain on other Land of the Tenant, tho' not ſubject to the Rent.

Attorney General verſus *Mayor of Coventry.*

THE Earl of *Aylesford* was intitled in Fee-ſimple to a Fee-Farm-Rent of 50 *l. per Annum*, reſerved to the Crown upon the Grant of King *Edw.* 1. of divers Franchiſes to the Corporation of *Coventry*, which Rent being, amongſt others, ſold by the Crown by Virtue of the Statute of 22 *Car.* 2. *cap.* 6. (for the Advancing of the Sale of Fee-Farm-Rents,) became veſted in the ſaid Earl; and by the Words of the above mentioned Statute, as full a Remedy is given to the King's Patentees, their Heirs and Aſſigns, as the King himſelf had, excepting an Extent.

So that the Earl of *Aylesford* (among other Privileges) might undoubtedly have diſtrained for this Fee-Farm-Rent upon *any other* of the Lands belonging to the Corporation of *Coventry*; but the Lands of that Corporation being under Sequeſtration, for the Non-payment of a Sum of Money decreed to belong to Sir *Thomas White*'s Charity, this made the Difficulty.

And the Lord Chancellor, having called to his Aſſiſtance the Chief Juſtices *Parker* and *King*, held,

Firſt, That the King might reſerve a Rent out of a Franchiſe, or Matter incorporeal, as well as out of Lands, and might diſtrain on any other Lands of the Tenant for it.

The King may reſerve Rent out of Things incorporeal, and may diſtrain for this Rent on any other Lands of the Tenant; but not on ſuch other Lands of the Tenant as are let out by Tenant, or extended. Q. If he may diſtrain on other Lands of the Tenant under Sequeſtration.

Secondly, That tho' by Virtue of the ſaid Statute of *Car.* 2. the Grantee of a Fee-Farm-Rent had the like Remedy, by Way of Diſtreſs, as the King himſelf had; yet that ſuch other Lands muſt be in the actual Poſſeſſion of the Tenant: For if the Tenant ſhould have made any Leaſe for Years, or at Will only, the Goods or Chattels of ſuch an Under-Leſſee were not diſtrainable even by the King, and conſequently not by his Grantee.

Thirdly, That as any Leaſe made by the King's Tenant, of the Lands not held of the King, would prevent even the King's Diſtreſs: So if there were an Extent upon an *Elegit* of ſuch other Lands, the Goods or Chattels upon the Premiſſes ſo extended, would not be liable; for this was a greater Eſtate than an Eſtate at Will.

But it was ſaid, a Sequeſtration was only in Nature of a *Levari* at Common Law, and that the Party ſequeſtring had no *jus ad rem, vel in re*, the legal Eſtate of the Premiſſes remaining, in every Reſpect, as before; and that it would be an extreme Hardſhip, if ſuch Proceſs of Sequeſtration ſhould be allowed to be made uſe of, to hinder a plain precedent Right of another.

Sequeſtration is favoured as an Execution and Fruit of a long Suit.

On the other Side it was argued, that ſince a Sequeſtration was the Execution and Life of a Court of Equity, and was the Fruit of a long Suit, ſo for that Reaſon, it ought to be favoured. However, the Matter ended in this: The Lord Chancellor held, he could not (as was prayed) order the Sequeſtrators to pay the Arrears of the Fee-Farm-Rent out of the Money or Rent ſequeſtred; in regard the Earl of *Aylesford*, the Claimant thereof, had no Decree, or Bill for the ſame; nor was there any Contempt, on which the Court could ground a Sequeſtration, as to the ſaid Earl, in Reſpect of his Fee-Farm-Rent, ſo as to let him have the Benefit of this Sequeſtration; and ſhould the Sequeſtrators be ordered to pay him the Arrears of the Fee-Farm-Rent, this would be to put the Earl in a better Condition, than he would have been in, had there been no Sequeſtration.

Wherefore the Court ordered, that the Earl of *Ayleſford* ſhould be at Liberty to diſtrain for his Rent at Law, without incurring any Contempt in Equity; and that no Leaſe or Eſtate derived under the Sequeſtrators, ſhould be made uſe of in Evidence againſt the Claimant of the Fee-Farm-Rent, to prevent the Diſtreſs.

Afterwards C. J. *Parker* informed me, that he thought it might have been proper to have determined, that the Sequeſtration was as the Hand of the Court upon the Eſtate, and where a Right to a Fee-Farm-Rent appeared to be prior and indiſputable, the Court might reaſonably enough have ordered Payment; elſe the Earl, for ought appeared, would be in a worſe Condition,

dition, than if there had been no Sequeſtration; for till the Sequeſtration, the Corporation paid the Fee-Farm-Rent voluntarily, and now they were diſabled purely by the Sequeſtration, and putting the Earl to diſtrain, was putting the Charge of this Suit upon the Eſtate; whereas nothing appeared to the contrary, but that the Corporation was ſenſible of the Earl's Right to the Rent, and deſired it might be paid.

As to the King's Power of Diſtreſs on any Lands of the Tenant, tho' not held of the King, 5 *Co.* 4, 56. 1 *Rol. Abr.* 670. 2 *Rol. Abr.* 159. 2 *Inſt.* 132. 4 *Inſt.* 119. *Lane* 39. were cited.

DE

Term. Paſchæ,

1716.

Caſe 80.

Twiſleton verſus *Griffith*.

A Son, who after his Father's Death is a Remainder-man in Tail, ſells this Remainder at an under Rate; Court ſet aſide the Conveyance.

IN a Bill brought to ſet aſide a Sale of a Reverſion, the Caſe appeared to be, That the Plaintiff's Father was Tenant for Life, Remainder to the Plaintiff in Tail, Remainder over to a third Perſon.

That the Plaintiff the Son, having married a Wife with a ſmall Portion, thereby incurred his Father's Diſpleaſure; but upon the Wife's Father's advancing 500 *l.* for her Portion, the Father made a proportionable Settlement, and received the Son and his Wife into his Houſe.

Afterwards, the Defendant, having been an Attorney, (tho' he had left off practiſing for a conſiderable Time, yet) took upon him to adviſe and direct the Plaintiff in every Thing, and profeſſed great Friendſhip for him; and after his Father was reconciled to him, and when the Plaintiff, being in Debt, was deſirous to ſell this Reverſion to his Father, who propoſed

Giving

Giving him 1000 *l.* for the ſame, the Defendant by Letter diſſwaded him from it, declaring that this was no valuable Conſideration.

But in about a Year afterwards, when the Plaintiff's Father was ancient and ſickly, and in a very declining Life, the Defendant himſelf bought this Reverſion of the Plaintiff for 1050 *l.* when the Eſtate was worth 150 *l. per Annum*; and the Plaintiff at this Time was thirty-four Years of Age, and had a Child about ten Years old, who was inheritable to the Intail; and the Plaintiff levied a Fine of this Reverſion to the Defendant.

In about two Years Time the Plaintiff's Father died; and upon the Plaintiff's Bill to ſet aſide this Conveyance, he, in order to gain an Injunction, by the Direction of the Court, ſuffered a Common Recovery, and declared the Uſes of it to the two Senior Six Clerks, ſubject to the Order of the Court.

And now it was argued for the Defendant, that here was no Fraud in obtaining this Conveyance; that the Defendant ran a Hazard of loſing his 1050 *l.* in caſe the Plaintiff had died without Iſſue, in the Father's Life-time; and it appeared, that the Plaintiff himſelf bought a Commiſſion to go into the Army; and the Child, being about ten Years old, was ſubject to many Diſeaſes, that might take him off, as the Small-Pox, *&c.* and as the Defendant ran the Hazard, ſo he ought to have the Benefit thereof; that if ſuch a Tranſaction as this, were liable to be impeached afterwards in a Court of Equity, it would be almoſt impracticable for an Heir ever to ſell a Reverſion; and that a Purchaſe, if fairly made, was not to be ſet aſide meerly for its having turned out a good Bargain.

But Lord Chancellor decreed Relief upon Payment of Principal and Intereſt, and full Coſts; grounding his Opinion, chiefly, upon the Caſe of (*a*) *Berney* and *Pitt*; where the Plaintiff's Father was Tenant for Life of a conſiderable Eſtate, Remainder in Tail to the Plaintiff, Remainder over; and the Defendant lent the Plaintiff the two ſeveral Sums of 1000 *l.* and 1000*l.* upon which the Plaintiff *Berney* gave two Judgments of 5000 *l.* a-piece defeaſanced each of them to pay 5000 *l.* in caſe the Plaintiff ſhould ſurvive his Father, and to pay Intereſt for the ſame, in caſe he ſhould marry in the Life of his Father, but if he ſhould die in the Life of his Father, then the Principal was to be loſt.

(*a*) 2 Vern. 14.

One lent an Heir 1000 *l.* to pay 2500 *l.* if he ſurvived his Father, elſe nothing, Equity relieved.

This Cauſe was firſt heard by (*b*) Lord *Nottingham*, who denied Relief: And after that the then Plaintiff had been conſtrained to pay the Money, (*viz.*) 5390*l.* upon the Decree; yet upon the (*c*) Re-hearing before the Lord *Jeffereys*, his Lordſhip did relieve; declaring, that theſe Bargains were corrupt and fraudulent, and tended to the Deſtruction of Heirs ſent to Town for their Education, and to the utter Ruin of Families; and that the Relief of the Court ought to be extended to meet with ſuch corrupt Bargains and unconſcionable Practices.

(*b*) 33 Car. 2.

(*c*) Hill. 2 Jac. 2.

Accordingly Lord *Cowper* ſaid, this alſo was the Caſe of an Heir, and who was the leſs upon his Guard with the Defendant, as he pretended nothing to him but Friendſhip, by incouraging him to leave his Father's Houſe, and diſſwading him from ſelling the Reverſion to his Father for 1000 *l.* which was but 50 *l.* leſs, and this a Year before; that the Reaſon inducing the Lord *Jeffereys*'s Decree, was, (probably) to diſcourage a growing Practice of devouring an Heir, on a Confidence in Lord *Nottingham*'s Decree; but Lord *Jeffereys*'s Decree ſtanding, ſhew'd that every one thought the ſame was juſt; and that there was therefore no Attempt in Parliament to reverſe it.

His Lordſhip added, he ſaw no Inconvenience in the Objection, that at this Rate, an Heir, without Difficulty, could not ſell a Reverſion; this might force an Heir to go Home, and ſubmit to his Father, or to bite on the Bridle, and indure ſome Hardſhips, and in the mean Time, he might grow wiſer, and be reclaimed.

Wherefore let the Plaintiff be relieved on Payment of Principal, Intereſt and full Coſts; I mean *liberal* Coſts.

DE

Term. S. Trinitatis,

1716.

Caſe 81.

Copeman verſus *Gallant*.

Bankrupt, though in Poſſeſſion, yet if impowered to diſpoſe of Goods in Truſt for another, they are not liable to the Bankruptcy, either in Law or Equity.

A. MADE a Bill of Sale of ſome Leaſes and Perſonal Eſtate to *B.* and *C.* in Truſt to pay *A.*'s Debts; at firſt *B.* acted in the Truſt; but afterwards *C.* took the whole into his Poſſeſſion, and acted alone, and became a Bankrupt.

Upon which, *A.* brought a Bill againſt *C.* and others, to bring *C.* and his Aſſignees under the Commiſſion of Bankruptcy to an Account touching the Perſonal Eſtate of *A.* ſo aſſigned in Truſt for the Payment of his Debts, as aforeſaid. And Lord *Cowper* being about to pronounce his Decree for the Plaintiff, (*viz.*) That the Defendants ſhould account, ſaid, that he bethought himſelf, there was a Clauſe in one of the Statutes of Bankrupts which might affect this Caſe, where it was declared, that " the truſting Goods in " the Poſſeſſion of a Bankrupt, this gave him Cre-

" dit, and induced others to truſt him, and therefore, " ſhould make the Goods liable to the Bankrupcy"; wherefore he directed, that the Statute ſhould be looked into, and particularly the Clauſe in the 21ſt of *Jac.* 1. *cap.* 19. *ſect.* 10 & 11. which being accordingly read, appeared to be in the following Words: (*viz.*)

" And for that it often falls out, that many Perſons before they become Bankrupts do convey " their Goods to other Men upon good Conſideration, " yet ſtill do keep the ſame, and are reputed the Owners " thereof, and diſpoſe of the ſame as their own, " be it enacted, that if at any Time hereafter, any " Perſon or Perſons ſhall become Bankrupt, and at " ſuch Time as they ſhall ſo become Bankrupt, ſhall " by the Conſent and Permiſſion of the true Owner " and Proprietary, have in their Poſſeſſion, Order, " and Diſpoſition, any Goods or Chattels, whereof " they ſhall be reputed Owners; and take upon themſelves the Sale, Alteration, or Diſpoſition as Owners, " that in every ſuch Caſe ſuch Goods ſhall be liable " to the Bankrupt's Debts, as if they had been the " proper Goods of the Bankrupt."

Upon the reading of which Clauſe Lord Chancellor declared, that he thought this Clauſe governed the Caſe then before him, and thereupon diſmiſſed the Plaintiff's Bill with Coſts.

But I being of Counſel for the Plaintiff, and reading the Clauſe of the Statute, did, at the riſing of the Court, deſire, that we might have another Day to ſpeak to this Clauſe, it being a very hard Caſe; which Lord Chancellor granted; and accordingly, at (*a*) another Day in *Trinity* Term 1716. the Cauſe coming on upon this Point only,

I ob-

(*a*) June 9.

I obſerved, that the Printer of the Statute Books Miſtakes, in *dividing* this Paragraph of the Act on which the preſent Queſtion depends, and in making it no Part of the Precedent Clauſe, ſo that this Clauſe being read to the Court, without the Preamble, and as a Subſtantive Clauſe, had, the greater Weight againſt us; and, indeed, in like Manner, the laſt Words of this very Clauſe [(*viz.*) for the better Payment of Bankrupt's Debts, and diſcouraging of Men to become Bankrupts] belong to the next following Paragraph of the Act, though made, by the Printer, Part of this.

But, probably, this will be of no Weight with the Court; in Regard, it will be taken, as if the Paragraphs were all rightly divided, it being a plain Miſtake of the Printer, and in the Act itſelf, in the Parliament Rolls, there are no Paragraphs, but a Continuation throughout of the ſame Lines.

But as to the principal Queſtion, it is to be obſerved, that the Chief End of the Statute was *to puniſh Frauds committed by the Bankrupt.* For,

In the Clauſe juſt preceding this, it enables the Commiſſioners to proceed when the Bankrupt, by Fraud, makes himſelf accountant to the King.

Alſo, if the Bankrupt fraudulently conceals his Goods, or will not give an Account how he became a Bankrupt; this Act ſubjects the Bankrupt to the (*a*) Pillory, and to the Loſs of one of his Ears.

(*a*) Vide ſect. 7.

So that the Clauſe in Queſtion, was intended only to prevent a *Fraud* in the Bankrupt; and not to puniſh an innocent Man, or a third Perſon; and all the

Meaning of this Clauſe is, that if the Bankrupt himſelf aſſigns over *his own Goods*, and ſtill continues in Poſſeſſion, and acts as Owner of them, they ſhall be liable to his Debts; for the Continuance of the Poſſeſſion is a ſtrong preſumptive Evidence of Fraud; but this Preamble extends only to ſuch Goods, as were originally in the Bankrupt, and continued in his Poſſeſſion.

I muſt admit, the Words of the Clauſe are general; but I take it, that according to the Common Rule of conſtruing Acts of Parliament, and the Reaſon of this Caſe, the Generality of the enacting Clauſe ſhall be qualified by the Preamble, which is ſpecial and particular, and expreſsly ſaid to be the Reaſon of making the Act.

The Preamble of the Act has been always thought material in the Conſtruction of it; and by the Lord *Coke* it is called the *Key* of the Act of Parliament, to open and explain the Meaning thereof

Preamble of an Act of Parliament proper to explain the general Words in the Body. *Quære tamen & vide poſt* 320.

And the Preamble in this Caſe ſaying, "for "that Bankrupts frequently convey over *their* Goods, "and yet continue in Poſſeſſion and diſpoſe of them, "be it Enacted, *&c.*" (ſo that firſt the Miſchief is recited, and then comes the Remedy,) therefore it is reaſonable to conſtrue that the Remedy ſhall not be larger than the Miſchief; this is the common Rule, and it is much more reaſonable that it ſhould hold in the preſent Caſe, where, if the Clauſe ſhould not be reſtrained by the Preamble, it would occaſion a manifeſt Hardſhip.

If in any Caſe an Act of Parliament ſhall be reſtrained by the Preamble, it ſhall in this; to prevent a third Perſon, an innocent Perſon, from being wronged; to prevent the Application of the Eſtate of a third Perſon towards ſatisfying the Debt of another, and leaving his own Debt unpaid.

This is as harſh a Thing, eſpecially in Equity, as can well be imagined; it is a Conſtruction that utterly ruins the Plaintiff, nay, ruins him for being honeſt, and for making an honeſt Proviſion for his Debts; ſince his own Creditors, whom he thought, and might reaſonably think, he had provided for, will be unpaid, by this Conſtruction, and will come upon the Plaintiff for their Demands.

This very Caſe has receiv'd a Determination at Law (*Michaelmas* Term 1708.) in the Caſe of *L'Apoſtre* verſus *Le Plaiſtrier*, where an Action of Trover for a Parcel of Diamonds, was brought againſt the Defendant as Aſſignee under the Commiſſion of Bankruptcy awarded againſt one *Levi*, to whom, before the Bankruptcy, the Plaintiff had delivered the Diamonds to ſell; but it appearing upon the Trial (which was before C. J. *Holt*) that the real Property of the Diamonds belonged to the Plaintiff, this very Clauſe of the Statute of 21 *Jac.* 1. was inſiſted upon by the Defendant's Counſel; and this ſeeming an Hardſhip upon the Plaintiff, the Original Owner of the Jewels, it was made a Caſe in the King's Bench, where, on Argument, it was adjudged, that the general Words of this Clauſe ought to be explained by the Preamble; and that theſe Jewels, being originally the Plaintiff's, and the Bankrupt having no more than a bare Authority to ſell them for the Plaintiff's Uſe, were not liable to the Bankruptcy.

Now this, as well as the Principal Caſe, was within the Words of this Clauſe; in both Caſes, the Goods were in the Bankrupt's Cuſtody, and he, in both Caſes, was intruſted with a Power of ſelling and diſpoſing of them; only it was more likely, in the Caſe cited, that the Jewels might gain Credit to the Bankrupt, and might induce People to truſt him, than that the Stock of the Farm ſhould do ſo in the Principal Caſe; and, if in the Caſe cited, the Jewels were held not to be liable to the Bankruptcy, no more ſhall the Goods be, in the Principal Caſe; and if the Law be with us, it would be very ſtrange that Equity, in ſo hard a Caſe, ſhould be againſt us.

Suppoſe a Factor, who deals in the ſelling of the Goods of other People, ſhould become a Bankrupt, would it not be a very hard Caſe, that, by his Bankruptcy, the Goods of other People muſt be loſt?

Factor in Poſſeſſion, and impowered to ſell Goods for another, they are not liable to the Factor's Bankruptcy.

And yet this muſt be the Conſequence of this Decree, if it ſhould ſtand, as pronounced, againſt my Client; but (with Submiſſion) the Law and Practiſe are held to be otherwiſe.

Suppoſe an Executor in Truſt, of a large Perſonal Eſtate, and where there are great Debts, ſhould become a Bankrupt, would this Perſonal Eſtate, becauſe the Executor had a Power over it before the Bankruptcy, but never executed ſuch Power, be liable to all the Bankrupt's Debts, and in the mean Time all the Teſtator's Debts remain unpaid? And yet this would be the Conſequence, if the Clauſe in Queſtion were to be conſtrued according to the Words, and were not to be reſtrained by the Preamble.

Executor in Truſt becomes a Bankrupt, the Goods which he has as Executor not liable to the Bankruptcy.

Theſe Caſes, often, very often happen; and conſequently theſe Hardſhips would as often happen, if the Goods in the principal Caſe were to be liable to the Bankruptcy; therefore I hope, that this harſh Clauſe in the Statute, though it be general, ſhall yet be qualified, and reſtrained by the Preamble which is Special, and ſhall extend only to the Bankrupt's own Goods which he himſelf aliens and aſſigns, and ſtill keeps Poſſeſſion of; or to ſuch Caſes only, where there is ſome *Fraud*, which, like an ill Leven, will infect the whole Maſs.

But if the Court ſhould be of another Opinion, ſtill this Caſe is out of the Clauſe of the Statute of 21 *Jac.* 1. becauſe the firſt Aſſignment, which comprehends the whole Perſonal Eſtate of *A.* is made to *B.* as well as *C.* And therefore *C.* who afterwards became a Bankrupt, had not, alone, and without the joining of *B.* a Power over this Eſtate, and conſequently we are not within this Statute, though taken in any Senſe.

Lord Chancellor: I can by no Means allow of the Notion, that the Preamble ſhall reſtrain the Operation of the enacting Clauſe; and that, becauſe the Preamble is too narrow or defective, therefore the enacting Clauſe, which has general Words, ſhall be reſtrained from its full Latitude, and from doing that good which the Words would otherwiſe, and of themſelves, import; which (with ſome Heat) his Lordſhip ſaid was a ridiculous Notion; and inſtanced in the (*a*) *Coventry* Act, which, if it had recited the Barbarity of cutting *Coventry*'s Noſe, and the enacting Clauſe had been general, (*viz.*) againſt the Cutting of *any Member* whereby the Man is diſfigured or defaced, it might with equal Reaſon be objected, that Cutting of the

(*a*) 23 *Car.* 2. *cap.* 1.

the Lips, or putting out the Eye, would not have been within the Act, becauſe not within the Preamble.

However, his Lordſhip held this Caſe not to be within the Clauſe of the Statute of 21 *Jac.* 1. in regard this Aſſignment to *B.* and *C.* was with an honeſt Intent, (*viz.*) for the Payment of the Debts of the Aſſignor.

Therefore the Aſſignees under the Commiſſion of Bankruptcy ſued out againſt *C.* were ordered to account for all the Eſtate of *A.* which the Court declared ſhould not be liable to the Bankruptcy of *C.*

Caſe 82.

Lord Chancellor Cowper.

Ambroſe verſus *Ambroſe*.

A. a Freeman of *London* purchaſes in the Name of *B.* but no Truſt declared; *A.* dies, and *B.* gives a Declaration of Truſt; this is good againſt the Cuſtom.

A. Who was a Freeman of *London*, purchaſed an Eſtate in the Names of *Edward Ambroſe* (an Attorney at Law) and one *Hales*, who was the Clerk of *Edward Ambroſe*, and the Conſideration Money (being 9400*l.*) was mentioned in the Conveyance to be paid by *Edward Ambroſe*.

Evidences of a Truſt where an Eſtate is purchaſed in another's Name.

There were Proofs of *A.*'s going down to view the Purchaſe, and that he declared he would buy it in the Name of *Edward Ambroſe*, and that he deſired to conceal it from being known to be his Purchaſe, by Reaſon that he was but an inferior Officer in the Office of Coinage in the Tower of *London*, and on the Recoinage, had, in one Year, got an Eſtate of upwards of 20000 *l.* which he would have concealed. There was alſo full Proof, that the whole Purchaſe Money was the proper Money of *A.*

On the other Side it appeared, that *Edward Ambroſe* kept the Writings, and received the Rents of that Part of the Eſtate that was let, and that *A.* by a Paper (all of his own Hand-writing) dated 4 *May* 1699. and purporting to be an Eſtimate or Calculation made by him of all his Eſtate, and what he was worth at that Time, had charged *Edward Ambroſe*, as Debtor to him, for Money lent him to buy the ſaid Eſtate, and alſo for Intereſt due on Account thereof.

But that the ſaid *A.* dying, and leaving a Widow and three Daughters, and *Edward Ambroſe* appearing to be an inſolvent Perſon, the Wife and Friends of *A.* adviſed with the Common Serjeant of the City, to know, what was the proper Method to be taken for the ſecuring of *A.*'s Eſtate; who adviſed, that *Edward Ambroſe* ſhould give a Declaration of Truſt, purporting that this Purchaſe-Money was the proper Money of *A.* and that the Purchaſe was made in the Name of *Edward Ambroſe* in Truſt for *A.* which was accordingly done; but this Declaration was given after *A.*'s Death, and ſome Money (about 300 *l.*) was alſo given to *Edward Ambroſe* to procure this Declaration of Truſt from him.

Whereupon, on a Bill brought by the Daughters and Co-heirs for an Account of the Rents and Profits of this Eſtate, it was now inſiſted by the Widow of *A.* that, her Huſband being a Freeman, and this Purchaſe not being intended, much leſs compleated, in *A.*'s Life-time, and the Declaration of Truſt being only adviſed by the Friends of the Family, as the moſt prudent and effectual Method to ſecure the ſaid Debt, upon *A.*'s Death, the ſame ought to be looked upon as in Nature of a perſonal Eſtate, and conſequently, that a Right veſted in her by the Cuſtom of *London* to a Share of this Money in the Hands of *Edward Ambroſe*, which Right could not be altered or eluded by ſuch ſubſequent Declaration of Truſt.

But decreed by the Lord Chancellor, that the Strength of the Evidence was, that this Purchaſe made in the Life of *A.* in the Names of *Edward Ambroſe* and his Clerk, was in Truſt for *A.* However, it plainly appearing, upon the Evidence on both Sides, that the Conſideration-Money of this Purchaſe was the proper Money of *A.* had it not been for the Statute of Frauds, this would have made a reſulting Truſt; and the ſaid *Edward Ambroſe*, after the Death of *A.* executing the Declaration of Truſt, this plainly took it out of the Statute.

And as to the Objection, that the Declaration of Truſt ſhould not by Relation prejudice *A.*'s Wife, who was a third Perſon:

His Lordſhip anſwered, that the Declaration given by *Edward Ambroſe*, was Evidence of the Truſt, and all Evidence muſt affect a third Perſon; and as, if *Edward Ambroſe* had, after the Death of *A.* been examined as a Witneſs, and had declared on his Oath, that he was but a Truſtee for *A.* this would have bound *A.*'s Wife, and would have barred her Pretence; ſo here the Declaration of Truſt executed by *Edward Ambroſe*, was rather a ſtronger Evidence of the Truſt, and ought to bind the Wife of *A.* But conſidering all Circumſtances, the Court recommended it to the Heirs or Deviſees of *A.* that they would agree to let *A.*'s Wife come in, in this Caſe, for her Dower of this Truſt-Eſtate.

This Decree was affirmed in the Houſe of Lords, in *June* 1717.

Caſe 83.
Lord Chancellor Cowper.
2 Vern. 709.
Covenant to leave his Wife 620 *l.* Party dies inteſtate, and Wife's Share comes to above 620 *l.* this is a Satisfaction.

Blandy verſus *Widmore.*

UPON the Marriage of *A.* with *B.* there were Articles reciting, that, in Conſideration of the Marriage and of the Portion, it was agreed, that if *B.* the Wife ſhould ſurvive *A.* her intended Huſband, *A.* ſhould leave *B.* 620 *l.* and accordingly *A.* covenanted with *B.*'s Truſtees, that his Executors, within three Months after his Deceaſe, ſhould pay *B.* 620 *l.* if ſhe ſhould ſurvive him. *A.* died Inteſtate, and without Iſſue; upon which *B.* the Wife, by the Statute of Diſtribution, became intitled to a Moiety of the perſonal Eſtate, which was much more than 620 *l.* and the Queſtion was, whether the diſtributive Share belonging to *B.* being more than 620 *l.* ſhould go in Satisfaction of it?

Serjeant *Hooper*: This 620 *l.* is a Debt, and Debts muſt be firſt paid, after which the Diſtribution is to be made; and if the Inteſtate had made a Will, probably he would have given to his Wife ſomething additional to this 620 *l.* Now, what the Statute gives is not his Gift, and being not his Gift, is not to be taken as his Payment; or ſuppoſing it to be his Gift, ſtill it cannot be ſaid to be his Payment.

Lord Chancellor: I will take this Covenant not to be broken, for the Agreement is to leave the Widow 620 *l.* now the Inteſtate, in this Caſe, has left his Widow 620 *l.* and upwards, which ſhe, as Adminiſtratrix, may take preſently upon her Huſband's Death; wherefore let her take it; but then it ſhall be accounted as in Satisfaction of, and to include in it, her Demand by Virtue of the Covenant; ſo that ſhe ſhall not come in firſt as a Creditor for the 620 *l.* and then for a Moiety of the Surplus.

And

And Mr. *Vernon* ſaid, it had been decreed in the Caſe of *Wilcox* verſus *Wilcox* (*a*), *Trin.* 1706. That if a Man covenants to ſettle an Eſtate of 100 *l. per Annum* on his eldeſt Son, and he leaves Lands of the Value of 100 *l. per Annum* to deſcend upon ſuch Son, this ſhall be a Satisfaction of the Covenant to ſettle; and that this laſt was a ſtronger Caſe, it being the Caſe of an Heir, who is favoured in Equity; alſo the Caſe of (*b*) *Phinney* verſus *Phinney* was cited:

(*a*) 2 Vern. 558.

(*b*) 2 Vern. 638.

Whereupon the Decree made by Sir * *John Trevor* Maſter of the Rolls, was now affirmed by Lord Chancellor *Cowper*.

* 15 Feb. 1715.

Lord Lanesborough & al' verſus *Jones.*

Caſe 84.

A. is a Goldſmith, and there is mutual Credit betwixt *A.* and *B.* and *A.* becomes a Bankrupt; only the Ballance ſhall be liable to the Bankruptcy: Not material whether the mutual Credit be by open Account, or mutual ſtated Debts.

SAMUEL *Jones* Eſq; borrowed 1500 *l.* of *Coggs* the Goldſmith on Mortgage, and *Coggs* owed about 1400 *l.* to *Jones*, upon his the ſaid *Coggs*'s Notes; the Notes were payable to the Biſhop of *London*, *Hatton Compton*, and the ſaid *Samuel Jones* or Order, but this was in Truſt for the ſaid *Samuel Jones*; and the Biſhop, *Hatton Compton*, and *Samuel Jones*, had all indorſed the Notes, which were in the Cuſtody or Power of *Jones*; and *Jones* went to demand the Money of *Coggs*, who agreed to allow *Jones* 5 *l. per Cent.* for the Money on the Notes, till Payment.

Coggs failed afterwards; and an Act of Parliament was made for the Veſting the Effects and Eſtate of *Coggs* in Truſtees, (the Plaintiff Lord *Lanesborough* and others,) who were to act in Nature of Commiſſioners and Truſtees for the Creditors of *Coggs*, and they inſiſted, that *Jones* the Mortgagor ſhould pay all the

Mortgage Money, but that as to the Money due on *Coggs's* Notes, *Jones* ſhould come in, under the Commiſſion, only *pro ratâ*, with the reſt of the Creditors.

But decreed by Lord Chancellor *Cowper*, with great Clearneſs, that in regard, by the late Statute of 4 *Ann. cap.* 17. *ſect.* 11. it is enacted, That where there is mutual Credit between a Bankrupt and another, only the Ballance ſhall be paid: So in this Caſe, here was a plain mutual Credit, (*viz.*) *Coggs* gave Credit to *Jones* on the Mortgage, and *Jones* gave Credit to *Coggs* on his Notes, and therefore the Ballance ſhould only be paid; and this Clauſe in the Statute was not to be conſtrued of Dealings *in Trade* only, or in caſe of mutual running Accounts; but that it was natural Juſtice and Equity, that in all Caſes of mutual Credit, only the Ballance ſhould be paid, and that the Commiſſioners or Truſtees in this Act of Parliament, ſhould not be in a better Condition than *Coggs* himſelf would have been in; that if, inſtead of the preſent Bill which was to foreclose the Mortgage, *Coggs* himſelf, before his Bankruptcy, had brought ſuch a Bill, ſurely no more than the Ballance ſhould have been allowed him; and there was no Reaſon that *Jones* ſhould ſuffer by the Accident of *Coggs's* Bankruptcy; neither could the Commiſſioners, or if *Coggs* had been in the Caſe of a common Bankrupt, could the Aſſignees, be in a better Condition than *Coggs* himſelf would have been in.

But it ſeems, if *A.* and *B.* are joint Traders, and *J. S.* owes *A.* and *B.* on their joint Account, 100 *l.* and *A.* owes the ſaid *J. S.* 100 *l.* on his ſeparate Account, *J. S.* cannot deduct ſo much, as *A*'.s Proportion of the 100 *l.* comes to, out of the joint Debt; for that the Copartnerſhip Debts of *A.* and *B.* are to be (*a*) firſt paid, before any of the ſeparate Debts; but if there be a Surplus beyond what will pay the Partnerſhip Debts, then, out

(*a*) Vide 2 Vern. 293, 706.

out of *A.*'s Share of the Surplus, *J. S.* may deduct the ſeparate Debt of *A.*

Anonymus.

Caſe 85.

One deviſes the Surplus of his perſonal Eſtate to his Relations; only ſuch ſhall take who are capable of taking within the Statute of Diſtribution.

IT was ſaid by the Maſter of the Rolls, and admitted by Mr. *Vernon* and others, to be ſettled, that where one deviſes the reſt of his perſonal Eſtate to his Relations, or to be divided among his Relations, without ſaying what Relations, it ſhall go among all ſuch Relations as are capable of taking within the (*a*) Statute of Diſtribution; elſe it would be uncertain; for the Relation may be infinite.

One deviſes the Surplus of his perſonal Eſtate to his Poor Relations, how conſtrued.

But in the principal Caſe, the Teſtator deviſed the Surplus of his perſonal Eſtate to his *Poor Relations*; and the Counteſs of *Winchelſea* being a Relation, as near as any, to the Teſtator, ſhe was a Party to the Suit, and claimed a Share; and it was decreed, ſhe was intitled thereto; in regard the Word [Poor] was frequently uſed as a Term of *Indearment*, and *Compaſſion*, rather than to ſignify an *indigent* Perſon; as one ſpeaking of one's Father, often ſays, my *Poor Father*, or of one's Child, *my Poor Child*.

But this ſeems to have been a ſtrained Interpretation in Favour of the Earl and Counteſs of *Winchelſea*, who had not an Eſtate any Ways proportionable to their Quality.

DE

(*a*) See the Caſe of *Roach* verſus *Jones*, Preced. in Chan. 401. but more particularly *Cor* verſus *Bedford*, 2 Chan. Rep. 77.

DE

Term. S. Michaelis,

1716.

Caſe 86.

Lord Chancellor Cowper.

An Owner of a Quit-Rent ſhall pay Taxes only in Proportion to what the Land pays; but if the Matter has been examined by the Commiſſioners of the Land-Tax, this Court will not re-examine it.

Brockman verſus *Honywood.*

Brockman had a Quit-Rent of 3 *l.* a Year, as belonging to his Manor of *Dale*, and iſſuing out of the Lands of the Defendant Sir *William Honywood*, who, in the Payment thereof, inſiſted to deduct two Shillings in the Pound for the Land-Tax of four Shillings in the Pound; and ſummoned the Plaintiff before the Commiſſioners to adjuſt the Land-Tax on the Quit-Rent, who accordingly aſcertained it at two Shillings in the Pound; after which the Defendant tendered the Quit-Rent, deducting two Shillings in the Pound.

On the other Side the Plaintiff inſiſted, that the Defendant ought to deduct out of the Quit-Rent only in Proportion to what the Land, out of which the Quit-Rent iſſued, paid; which in the preſent Caſe was leſs than two Shillings in the Pound; and that the Commiſſioners of the Taxes had no Power to aſcertain what ſhould be deducted; wherefore he brought this Bill, in order to have the Court ſettle the Proportion, by ſending it to a Maſter.

Lord Chancellor: The Plaintiff is ſpending a Shilling to get a Half-penny. Tho' the Commiſſioners have no Power to ſettle the Proportion of Taxes, as to what the Tenant ſhall deduct for them out of the Quit-Rent; yet they being Gentlemen of the Country, and living upon the Spot, and having Power to tax the Quit-Rent, I will look upon what they have done to be a proper Meaſure of Juſtice; and therefore the Plaintiff has not done well not to acquieſce under it; ſo diſmiſs his Bill with Coſts.

But at the ſame Time I declare my Opinion to be, (as has been before reſolved,) that a Quit-Rent, or Fee-Farm, in Caſe of Payment to the Land-Tax, (ſuppoſe a Tax of four Shillings in the Pound,) ought not to have four Shillings in the Pound deducted, unleſs the Land, out of which ſuch Rent or Fee-Farm iſſues, pays four Shillings in the Pound, but is to pay only in Proportion as ſuch Land pays.

Criſtian verſus *Corren*.

Caſe 87.
Before a Committee of Council at the Cockpit.
Appeal from a Decree in the Iſle of *Man*.

THE Earl of *Derby*, King of the Iſle of *Man*, made a Decree in that Iſland concerning Lands there; and the Perſon, againſt whom the Decree was made, appealed hither.

The Subject cannot be deprived of his Right to appeal by any Words in the King's Grant to that Purpoſe, much leſs, if the Grant be ſilent in that Particular.

One (and indeed the principal) Queſtion was, whether an Appeal did lie before the King in Council, there being no Reſervation in the Grant made of the Iſle of *Man* by the Crown, of the Subjects Right of Appeal to the Crown.

And it was urged for the Appeal by my ſelf, (who alone was of Counſel with the Appellant,) that it appearing, in this Caſe, that *H.* 4. had granted the Iſle of *Man* to the Earl of *Derby*'s Anceſtors, to hold by Homage and other Services, tho' there was no Reſervation of the Subjects Right of Appeal to the Crown, yet this Liberty was plainly implied.

For that ſuch Liberty of Appeal lay in all Caſes where there was a Tenure of the Crown; that it was the Right of the Subjects to appeal to the Sovereign to redreſs a Wrong done to them in any Court of Juſtice; nay, if there had been any expreſs Words in the Grant to *exclude* Appeals, they had been void; becauſe the Subjects had an inherent Right, inſeparable from them *as Subjects*, to apply to the Crown for Juſtice. And on the other Hand,

The King, as the *Fountain of Juſtice*, had an inherent Right, inſeparable from the Crown, to diſtribute Juſtice among his Subjects; and if this were a Right in the Subjects, no Grant could deprive them of it; the Conſequence of which would be, that in all ſuch Caſes, *viz.* where there were Words excluſive of ſuch Right of Appeal, the King would be conſtrued to be deceived, and his Grant void: Alſo Precedents were cited in Point.

Lord Chief Juſtice *Parker*, who aſſiſted at Council upon this Occaſion, thought that the King in Council had neceſſarily a Juriſdiction in this Caſe, in order to prevent a Failure of Juſtice; and took Notice, that if a Copyholder ſhould ſue by Petition in the Lord's Court, upon which the Lord ſhould give Judgment, tho' no Appeal or Writ of Error would lie of ſuch

Judgment,

Judgment, yet the Court of Chancery would correct the Proceedings, in caſe any Thing were done therein againſt Conſcience.

Whereupon their Lordſhips proceeded in this Appeal, and determined in Favour of the Appellant; and it is obſervable, that Lord *Derby* alſo, at Length, rather than that ſome Things in the Grant made by the Crown to his Anceſtors ſhould be looked into, choſe to ſubmit, and expreſs his Conſent, that the Matters in Queſtion on the Appeal ſhould be examined by the King in Council.

DE

Term. S. Hillarii,

1716.

Caſe 88.

Humberſton verſus *Humberſton.*

Lord Chancellor Cowper.

2 Vern. 737. Preced. in Chan. 455.

ONE *Matthew Humberſton,* (reported to have been formerly a *Chriſt-Hoſpital-Boy,*) deviſed his Eſtate, which was very conſiderable, to the Drapers-Company, and their Succeſſors, in Truſt to convey the Premiſſes to his Godſon *Matthew Humberſton* for Life, and afterwards, upon the Death of the ſaid *Matthew,* to his firſt Son for Life, and ſo to the firſt Son of that firſt Son for Life, *&c.* and if no Iſſue Male of the firſt Son, then to the ſecond Son of the ſaid *Matthew Humberſton* for Life, and ſo to his firſt Son, *&c.* and in Failure of ſuch Iſſue of *Matthew,* then to another *Matthew Humberſton* for Life, and to his firſt Son for Life, *&c.* with Remainders over to very many of the *Humberſtons,* (I think about fifty,) for their Lives ſucceſſively, and their reſpective Sons, when born, for their Lives, without giving an Eſtate in Tail to any of them, or making any Diſpoſition of the Fee.

Deviſe of Lands to a Corporation, in Truſt to convey the Premiſſes to his Godſon *A.* for Life, and ſo to his firſt Son for Life; and afterwards to convey the Premiſſes to the firſt Son of that Son for Life; and in Failure of ſuch Iſſue of *A.* to convey it to *B.* for Life, *&c.* this is a Perpetuity; but the Conveyance ſhall be made as near the Intent of the Party as the Rules of Law will admit, (*viz.*) by making all the Perſons in Being but Tenants for Life; but the Limitation to the Sons unborn muſt be in Tail.

On a Bill brought by the firſt Deviſee againſt ſeveral in Remainder, the Truſtees, and Executors, and alſo againſt the Attorney General, (no Heir being to be found,) for an Execution of the Truſts of the Will:

By *Lord Chancellor*: Tho' an Attempt to make a Perpetuity for ſucceſſive Lives be vain, yet ſo far as is conſiſtent with the Rules of Law, it ought to be complied with; and therefore let all the Sons of theſe ſeveral *Humberſtons*, that are already born, take Eſtates for their Lives; but where the Limitation is to the firſt Son unborn, there the Limitation to ſuch unborn Son ſhall be in Tail Male.

2*dly*, Whereas it was objected, that where the Limitation, for Want of Iſſue Male of the firſt *Matthew Humberſton*, gave a Remainder over, theſe Words, [for Want of Iſſue Male of the firſt *Matthew Humberſton*,] did by Implication create an Eſtate-tail in the ſaid *Matthew Humberſton*, precedent to the next Remainder; the Court ſaid, that theſe being Words of Implication only, after an (*a*) expreſs Eſtate for Life, and being in Default of (*b*) *ſuch Iſſue*, could not create an Eſtate-tail; and the rather too, in regard this would defeat the Intent of the Teſtator, by impowering the firſt *Matthew Humberſton*, by a Recovery, to bar all the ſubſequent Remainders.

(*a*) Vide in *Bampfield* verſus *Popham*, 56.

(*b*) Vide in *Blackborn* verſus *Hewer Edgley*, & *è cont'*, 605.

3*dly*, In this Caſe the Teſtator, as an Incouragement to his Executors (who were four) to accept of the Truſt and Executorſhip, had given to each of them 100 *l.* and 12 *l.* a-piece for Mourning, and to each of them a Ring, and 10 *l.* a Year for their Trouble.

Deviſe to Truſtees, as an Incouragement to accept the Truſt, of 100 *l.* apiece, and 12 *l.* for Mourning, and a Ring, and 10 *l.* a-piece for their Trouble; one refuſes, yet he ſhall have his Mourning and Ring, but not the 100 *l.* Legacy, and the 10 *l.* a Year, which, in ſuch Caſe, ſhall not go to the acting Executors, but ſink into the Eſtate.

Upon which Lord Chancellor ſaid, that notwithſtanding the Condition of the Acceptance might ſeem to run to all the Legacies, yet the Executors, tho' they did not act, ſhould have their Rings and Mourning, theſe being intended them immediately, and not to wait their Time of Acceptance; but that they ſhould not have their 100 *l.* and an Annuity of 10 *l.* each, unleſs they accepted of the Truſt; and that the Share or Annuity of the renouncing Executor, ſhould not go over to the acting Executors as a further Incouragement, but ought to ſink for the Benefit of the Eſtate.

Caſe 89.
Lord Chancellor Cowper.
2 Vern. 750.
A Recognizance not inrolled ſhall be looked upon as a Bond, and paid as Debt by Specialty.

Bothomly verſus *Lord Fairfax.*

THE late Lord *Fairfax* deviſed his Eſtate for Payment of his Debts, which Eſtate being accordingly by the Court decreed to be ſold, and the Money to be applied for that Purpoſe, with Directions, to pay firſt the Mortgages, then the Judgments and Recognizances affecting the Land, and then other Debts; and that all the Creditors ſhould be at Liberty to come before the Maſter and prove their Debts:

The Maſter reported, that one *James Chaplin* had a Recognizance from Lord *Fairfax* in the Penalty of 1000 *l.* for the Payment of 500 *l.* and Intereſt at 6 *l. per Cent.* which Recognizance had been aſſigned by the ſaid *Chaplin* to *Samuel Philips*, but that this Recognizance happening not to be inrolled, therefore he (the Maſter) ſubmitted it, whether it ſhould be taken as a Recognizance, or as a Bond only.

And I, being of Counſel for *Philips* the Aſſignee, argued, that this Recognizance ſhould be taken and paid as a Recognizance.

It

It is the Acknowledgment before a competent Judge, that gives a Recognizance its Force, *Hob.* 196. *Hall* and *Wingfield*'s Caſe; the Inrolment of it, is what is done by a miniſterial Officer only, and is made uſe of as a proper Method for the Preſervation of the Security for ſafe Cuſtody, and for the notifying it to others; this is further proved by the Authorities that ſay, the Recognizance binds the Land *from the Time of the Caption.* 1 *Vent.* 360. *Hob.* 196. So that if the Cognizor acknowledges a Recognizance, and aliens the Land, or dies before Inrolment, yet the Recognizance ſhall bind the Land in the Hands either of the Alienee, or the Heir.

What is ſaid in *Hob.* 106. in *Hall* and *Wingfield*'s Caſe, ſeems very material, *viz.* That the firſt Acknowledgment of the Cognizor of the Recognizance binds his Perſon and his Lands, as a Record from that Time, ſo that the very Acknowledgment of a Recognizance before a competent Judge, alone makes it a Record before the Inrolment.

And, with Submiſſion, it is very reaſonable it ſhould be ſo, I mean, that the Recognizance without the Inrolment, ſhould be a perfect Recognizance. Since the Party, who is to give the Security, has done his Part by acknowledging the Recognizance; the Judge, or Maſter in Chancery, that takes it, has alſo done his Part by ſubſcribing the Caption; and after all this Solemnity, ſhall the Neglect, or Nonfeazance of the Officer (an Officer purely miniſterial) prevent this Lien from being of any Force, by the not inrolling it? This ſeems very unreaſonable.

I muſt own, there is a material Difference betwixt a Recognizance in the Nature of a Statute Staple, or

Statute Merchant, taken by Virtue of the Statute of *Acton Burnel*, (*viz.* 13 *Ed.* 1. or other Acts of Parliament impowering the taking of ſuch Statutes,) and a Recognizance at Common Law.

It is moſt true, that thoſe Statutes Merchant or Staple, that are taken by Virtue of the Statute of *Acton Burnel*, or other Acts of Parliament, require particular Circumſtances to be obſerved in the taking of them; and if in the taking of thoſe Statutes, Staple or Merchant, the Acts of Parliament are not purſued, then they have not the Force of a Recognizance.

And it muſt be admitted to be a favourable Conſtruction of the Judges, to allow ſuch Recognizances defectively taken, to have the Force of Bonds, by Reaſon of the obligatory Words that are contained in them.

As for Inſtance, the Statute of *Acton Burnel* requires, that a Statute Merchant or Staple that is given, ſhall have two Seals affixed to it, (*viz.*) the Seal of the Cognizor, and the King's Seal, appointed for that Purpoſe; and to the ſame Effect it is enacted by the Statute of 23 *Hen.* 8. *cap.* 6. in the Caſe of Statutes taken by either of the Chief Juſtices.

Now where the Caſe has happened, that only the Seal of the Cognizor or Debtor was affixed to the Recognizance, this was void as a Recognizance; and in *Cro. Eliz.* 355, 461, 544. 2 *Rol. Abr.* 149. *Aſme* ver. *Hollingworth*, after many Arguments, and with great Difficulty, it was reſolved, that this Recognizance, being void as a Recognizance, might however be ſued as an Obligation, by reaſon of the Obligatory Words in it.

So a Recognizance not regularly taken may be ſued as an Obligation.

This (I ſay) is a benign Conſtruction; becauſe a Delivery, as well as Sealing is neceſſary to make a Bond; and if *Non eſt factum* were pleaded to a Recognizance ſo taken, it would be ſtraining pretty far, to make a Debtor's Acknowledging a Writing, as his Recognizance, to amount to the Delivery of it, as his Deed.

It is plain, where an Act of Parliament gives a particular Power of taking a Recognizance or Statute, that this Act of Parliament muſt be obſerved, and the Circumſtances required thereby, complied with; and if omitted, the Recognizance intended to be given, is not a Recognizance.

Yet it is otherwiſe in Caſe of a Recognizance at Common Law, (as ours in the Principal Caſe is) acknowledged before a Maſter of this Court, and where the Acknowledgment or Caption of it before a Judge, or Maſter, gives the Lien it's Force.

There is indeed an Act of Parliament made for the entering or inrolling of Statutes and Recognizances out of Regard to Purchaſors; as the 27 *Eliz. cap.* 4. which requires Statutes to be brought within four Months after the Acknowledgment of them to the Clerk, to be entered on the Roll; and it is thereby enacted, that the Statutes ſhall be entered on the Roll within ſix Months after the Acknowledgment; elſe, *quoad* any purchaſor, they ſhall be void.

But this very Act ſhews, that before the making thereof, the Statute needed not be entered on the Roll at all, and that even ſince, it need be entered only in the Caſe of a Purchaſor; whereas in the principal Caſe, there is no Purchaſor concerned, and the Recognizance is only made uſe of againſt the Heir, Executor, or voluntary Deviſee of the Lord *Fairfax*, the Cognizor thereof.

Therefore, ſince the Recognizance receives its Force from the Acknowledgment, ſince it binds the Lands of the Cognizor from the Acknowledgment, ſince it's a Record from the Acknowledgment, we humbly inſiſt, it is from that Time a Recognizance, and to be paid as ſuch.

But if an Inrolment ſhould be thought neceſſary, ſuch Inrolment, where no Purchaſor is concerned, is not confined to the Life of the Party, but, as we conceive, may be done at any Time.

Therefore, we pray, as to this Racognizance, which appears to have been given before one of the Maſters of this Court, that we may be, *even now*, at Liberty to inroll it; and this we conceive moſt reaſonable.

For it appears, in this Caſe, that the Security, which the Lender ſtipulated to have for his Money, was to be a Recognizance; it appears, that the Debtor agreed to give a Recognizance for the Security; it is plain, that in Confidence of this, the Money was actually lent; it is as plain, that the moſt worthy and material Parts of this Recognizance, I mean the Acknowledgment and Caption, are all of them perfected.

So that what remains to be done, is only by the miniſterial Officer to inroll it; and the Creditor ought not to ſuffer for the Neglect or Omiſſion of the Officer.

In Equity, where there is the Covenant or Agreement of the Parties, if made on a full and valuable Conſideration, whether it be to mortgage, or convey Lands, the Court will compel an Execution. If I Covenant, in Conſideration of Money lent, to mortgage ſuch Lands for it, this, in Equity, is a Mortgage, and ſuch a Lien upon the Land, as that, if the Covenantor die, the Heir is bound by it, though not named; ſuch a Lien upon the Land, as that, if the Covenantor become a Bankrupt, his Land thus covenanted to be mortgaged, ſhall not be liable to the other Creditors on the Commiſſion of Bankruptcy. So that it is no Objection, that the other Creditors will be prejudiced by the Inrolment of this Recognizance, for the other Creditors are as much prejudiced, in the Caſe laſt put of the Bankruptcy.

If it were admitted, that the Recognizance, for want of an Inrolment, is an imperfect Security, juſt as a Mortgage, if made by way of Feoffment, would be void for want of Livery; yet, as in ſuch Caſe, where the Security is made for a (*a*) full and valuable Conſideration, a Court of Equity would make it good, though againſt a mean Creditor by Judgment; in the ſame Manner will Equity help this imperfect Security, if it be imperfect for want of an Inrolment; it being agreed on all Sides, that the Security ſhould be a Recognizance, and in Confidence of this, the Money actually advanced.

(*a*) Vide 282, in the Caſe of *Finch* verſus *Earl of Winchelſea.*

And it is plain, when the Recognizance is inrolled, (if that be requiſite,) the Inrolment ſhall relate to the Acknowledgment, and make it perfect *ab initio.*

So that we humbly take it, the Recognizance, though not inrolled, is a good Recognizance, or if an inrolment

ment be requiſite, we are ſtill at Liberty to inroll it, and that it ſhall take place as a Recognizance.

On the other Side it was alledged, that without Inrolment this Recognizance was no Record, nor could it be given in Evidence as ſuch; and though no preciſe Time was fixed for the Inrolment of it, it was, however, reaſonable to follow the Equity of the 13 *Ed.* 1. *cap.* 4. which provides for the Inrolment of Statutes Merchant and Staple; and that, by the Courſe of the Petty-Bag, they never inrolled Recognizances after ſix Months, without a Special Order to do it *nunc pro tunc.* That in this Caſe Application had been made to the Maſter of the Rolls for Leave to do ſo, who had refuſed it; and particularly Sir *Joſeph Jekyll* inſiſted, that this Security ought to be deemed only as a Debt by Simple Contract, and not as a Bond, in regard it did not appear to have been delivered as a Deed.

Lord Chancellor: There is a juſt Suſpicion upon the Security, that this Recognizance was otherwiſe ſatisfied or ſecured, it not having been all this while inrolled; and whenever the Court permits the Inrolling of a Recognizance, after the Time elapſed, it always takes Care not to hurt an intervening (*a*) Purchaſor; and as that may happen to be the Caſe here, therefore *Philips* is to be looked upon as a Bond-Creditor only, the Sealing and Acknowledging thereof ſupplying the want of Delivery.

(*a*) To this Purpoſe ſee the Caſe of *Fothergil* verſus *Kendrick*, 2 Vern. 234.

Caſe 90.

Sir *John Trevor* Maſter of the Rolls.

Preced. in Chan. 470.

Northey verſus *Strange.*

A Freeman of *London* has no Wife, and has Iſſue *A.* a Son, and *B.* and *C.* Daughters, *C.* marries againſt her Father's Conſent, by which Means ſhe never had any Portion; afterwards ſhe dies in her Father's Life-Time, leaving a Son *D.*

I The

The Freeman makes his Will, wherein, taking Notice that he had given to his Son *A.* 400 *l.* and to his Daughter *B.* 1000 *l.* in full of their Orphanage Part by the Cuſtom, he deviſes 500 *l.* to his Grandſon *D.* and, after ſome other Legacies, gives one Moiety of the Surplus of his Perſonal Eſtate to his Son *A.* the other Moiety to his Children and Granchildren.

Afterwards the Freeman, in his Life-time, gives ſeveral further Sums, at ſeveral Times, to his Son, amounting to 600 *l.* more, the Certainty whereof does not appear under the Freeman's Hand, but does appear by the Son's Anſwer in the Cauſe; and then the Freeman dies, leaving his Daughter *B.* enſient with a Child which was afterwards born.

1*ſt*, It was admitted by the Counſel on both Sides, and decreed by the Court, that there being no Wife of the Freeman, (*a*) the Children were intitled to one Moiety, the other Moiety being the dead Man's Part.

(*a*) Salk. 426. 2 Vern. 612.

Where a Freeman of *London* leaves no Wife, the Children are intitled to one Moiety, and the other Moiety is the dead Man's Part.

2*dly*, It was admitted by Counſel, and ſaid to have been ſo determined, and ſettled, that a Freeman's Grandchild (where the Grandchild's Father was never advanced in the Freeman's Life-time, and died before the Freeman, leaving a Child,) (*b*) was not within the Cuſtom; and that only the Freeman's Children were within the Cuſtom, to come in for an Orphanage Part.

Grandchildren of a Freeman are not within the Cuſtom, to come in for an Orphanage Part.

(*b*) Salk. 426. 1 Vern. 397.

Freeman's Son has had ſeveral Sums from the Freeman, the Certainty of which does appear; the Son has had likewiſe ſeveral other Sums, the Certainty of which does not appear, otherwiſe than by the Son's Anſwer; the Son not barred, but ſhall come in for his Orphanage Part.

3*dly*, It was decreed, that whereas the Freeman's Son *A.* was by the Freeman's Will mentioned to have had 400 *l.* and conſequently the *Quantum* of *A.*'s Advancement appeared under the Freeman's Hand, yet this (*a*) very Declaration, by the Cuſtom, let the Son in for his Orphanage Part; and though the Son *A.* afterwards received farther Sums amounting to 600 *l.* from his Father the Freeman, and the Certainty thereof appeared by his own Anſwer, yet theſe Sums which were additional Gifts to his Advancement, being with the other 400 *l.* brought into Hotchpot, would not be a Bar to his Orphanage Part.

One deviſes the Surplus of his Eſtate to his Children and Granchildren; a Grandchild in *Ventre ſa Mere* at the Teſtator's Death, ſhall not take; *ſecus* had it been to the Children and Granchildren living at his Death.

4*thly*, That the Child of *B.* the Freeman's Daughter, who was in *Ventre ſa Mere* at the Freeman's Death, ſhould not take; in regard a Deviſe to one's Children and Grandchildren ſhould, *primâ facie*, refer only to ſuch Children and Grandchildren, as were living at the Time of the making of the Will; but if a Deviſe were to my Children and Grandchildren *living at my Death*, a Child in *Ventre ſa Mere* might, in ſuch Caſe, be ſo far regarded, as to be looked upon as living (*b*).

5*thly*, That the Son *A.* ſhould not come in for a Share of the remaining Surplus, he being, by the Words of the Will, ſeparated from the other Children, (*viz.*) the Deviſe being of one Moiety of the Surplus to the Teſtator's Son *A.* and the other Moiety to his Children and Grandchildren, ſo that the Son *A.* was intended to have only a Moiety.

(*a*) 2 Vern. 630.

(*b*) Vide ante, 246, the Caſe of *Beale* verſus *Beale*, & 487, *Burdet* verſus *Hopegood*.

6thly, That the Children and Grandchildren muſt take *per Capita*, and not *per Stirpes*; they all taking in their own Right, and not by way of Repreſentation.

Children and Grandchildren muſt take *per capita*.

7thly, That a Legacy of 500 *l.* being given to *A.* and if *A.* died before twenty-one, then to *B.* upon *A.*'s dying before twenty-one in the Life of the Teſtator, this was not a lapſed Legacy (*a*), but ſhould go over to *B.*

(*a*) 2 Vern. 207, 378, 611. & in *Lord Bindon* verſus *Earl of Suffolk*, 97.

Onions verſus *Tyrer*.

Caſe 91.

Lord Chancellor Cowper.

ONE by Will duly executed and atteſted by three Witneſſes, who ſubſcribed the ſame in the Preſence of the Teſtator, deviſed Lands to Truſtees, to ſeveral Uſes under which the Plaintiff claimed.

2 Vern. 741. Preced. in Chanc. 459. In a Will deviſing Lands, three Witneſſes muſt ſubſcribe in the Preſence of the Teſtator.

He afterwards made another Will of the ſame Lands, deviſing them to other Truſtees, but to the ſame Uſes, and there was a Clauſe, in this laſt Will, revoking all former Wills; but in this laſt Will, tho' ſubſcribed by the Teſtator, and atteſted by three Witneſſes, yet the Witneſſes did not ſubſcribe their Names in the Preſence of the Teſtator.

A Will or Writing, revoking a former Will, muſt be ſubſcribed by three Witneſſes, but this need not be in the Preſence of the Teſtator.

Upon which the Teſtator's Heir at Law laid claim to theſe Lands; and the Queſtion was, whether this laſt Will, which was admitted to be a void Will *quoad* the Lands in Queſtion, ſhould yet be a good Revocation of the former Will?

1*ſt*, The Diverſity betwixt the Penning of the two Clauſes in the Statute of Frauds was obſerved; (*ſcil.*) the Clauſe relating to the Deviſe of Lands (*a*) requires, that three Witneſſes muſt ſubſcribe in the Preſence of the Teſtator; but the Clauſe of revoking former Wills (*b*) ſays, that no Will in Writing of Land ſhall be revoked, unleſs it be by ſome other Will or Codicil in Writing, or Writing declaring the ſame, ſigned in the (*c*) Preſence of three or more Witneſſes; ſo that this laſt Clauſe does not direct that the Writing, which revokes, ſhould be ſubſcribed by three Witneſſes in the Teſtator's Preſence; but a Will of Land muſt be ſubſcribed by three Witneſſes, and that in the Teſtator's Preſence.

(*a*) Sect. 5.

(*b*) Sect. 6.

(*c*) Ante 11.

But then it was inſiſted, that this laſt Will, notwithſtanding the uſual Clauſe of revoking all former Wills, ſhould not revoke the firſt Will; for that the revoking Clauſe in the Statute requires, that ſuch Revocation ſhould be by a *Will*, which (it was ſaid) muſt be a *good* and *effectual* Will of Land, and this laſt Will was not ſo; neither was it a good Codicil, or ſo much as a Writing declaring an Intention of Revocation; for that this Writing, (ſuppoſing it to be a good Will,) was yet ſo far from intending to revoke the former Will, that it gave the Land exactly to the ſame Uſes; now the Revoking intended by this Clauſe of the Statute was ſuch, as ſhould be made purely with an Intention to revoke or deſtroy a former Will: and ſo it was held and reſolved in the Caſe of *Eccleſton* verſus *Speak*, in 3 *Mod.* 258. & *Show.* 89.

A void Will or Codicil, though there be a Clauſe of revoking all former Wills, will not however operate as a Revocation.

Lord Chancellor: I do allow of the Caſe of *Eccleſton* verſus *Speak*, in regard there the ſecond Will deviſed the Lands to the ſame Perſon to whom they had been deviſed by the firſt Will; and therefore it may be truly ſaid, that the ſecond Will did not intend to revoke the former, but rather to confirm it.

But ſuppoſe, in the latter Will, in that Caſe, there had been no Deviſe of the ſame Land to the ſame Perſon, or if the latter Will had only extended to the Perſonal Eſtate, and not to the Lands in Queſtion, then the general Clauſe of revoking all former Wills, might have been a good Revocation.

Cancelling a former Will by Miſtake, or on a Preſumption that a latter Will is good, which proves void, will not let in the Heir.

But a ſecond Will deviſing Lands to the ſame Perſon as the former, and revoking all former Wills, and this ſubſcribed by three Witneſſes, but not in the Teſtator's Preſence, ſhall never revoke the former Will, ſo as to let in the Heir; nay, if by the latter Will the Premiſſes in Queſtion had been given to a third Perſon, it ſhould never have let in the Heir, in regard the Meaning of the ſecond Will was, to give to the ſecond Deviſee, what it had taken from the firſt, without any Conſideration had to the Heir, and if the ſecond Deviſee took nothing, the firſt could have loſt nothing; or if the firſt Will had been cancelled by the Teſtator's Directions, upon a Preſumption, that the ſecond Deviſee was to take the Premiſſes by the ſecond Will, ſuch a Cancelling ſhould not have profited the Heir, becauſe it would have been a cancelling proceeding from a Miſtake: It is no more, than if the Teſtator, being Sick, and having his two Wills under his Pillow, ſhould by Miſtake give his laſt Will to be cancelled, or order one to cancel his Firſt, who, by Miſtake, cancels his Laſt.

And ſo in the principal Caſe, though the firſt Will was ordered by the Teſtator to be cancelled, and the ſame was in Fact cancelled accordingly, yet all this being upon a Preſumption, that the latter

Will was good, and duly executed, it is properly relievable under the Head of Accident. Wherefore let the Heir be injoined, and the firſt Deviſee hold and enjoy.

One makes Duplicates of his Will and cancels one of the Duplicates, this is a Revocation of the whole Will.

In this Cauſe it was ſaid by Sir *Thomas Powis*, and not denied by any, that if a Man, having two Duplicates of his Will, cancels one of theſe Duplicates with an Intention to deſtroy his Will; this is a good Revocation of the whole Will, and of both the Duplicates; and that this was Sir *Edward Seymour*'s Caſe.

DE

Term. Paſchæ,

1717.

Bagot verſus *Oughton*.

Caſe 92.
Lord Chancellor Cowper.
A Covenant to pay the Mortgage-Money not ſuable in Equity, unleſs Covenantor receives the Money; as where a Feme Sole, ſeiſed of Lands, mortgages, and marries *B.* and the Mortgage is aſſigned, and *B.* in the Deed of Aſſignment covenants to pay the Money and dies, his perſonal Eſtate not liable in Equity to pay the Mortgage-Money.

SIR *Edward Bagot* married the Daughter and Heir of Sir *Thomas Wagſtaff*, and for raiſing Part of Mrs. *Wagſtaff*'s Portion, Sir *Thomas Wagſtaff* mortgaged Part of his Eſtate for 3500 *l.* and died, leaving Lady *Bagot* his Daughter and Heir.

The Lady *Bagot* afterwards joined with her Huſband Sir *Edward* in a Deed and Fine, whereby ſhe ſettled her Eſtate on her Huſband and her ſelf, and the Heirs Male of the Body of her Huſband.

It happened, that the Mortgagee wanting his Money, Sir *Edward* joined in an Aſſignment of the Mortgage, and covenanted that he, or his Wiſe, or one of them, would pay the Money.

Afterwards Sir *Edward Bagot* died, leaving Sir *Walter* his Son by his ſaid Wife, and his Lady intermarried with the Defendant Colonel *Oughton*, and died.

And the Queſtion being, whether, by Reaſon of the Covenant from the ſaid Sir *Edward Bagot*, for the Payment of this 3500 *l.* Mortgage-Money, Sir *Edward*'s perſonal Eſtate ſhould be liable to pay the ſame?

(*a*) Vide the Caſe of *Evelyn* verſus *Evelyn*, 2 Vol. 596.

It was decreed by Lord Chancellor, that this Covenant by Sir *Edward* ſhould not oblige his perſonal Eſtate to go in Eaſe of the mortgaged Premiſſes; foraſmuch as the Debt being (*a*) originally Sir *Thomas Wagſtaff*'s, and continuing to be ſo, the Covenant upon the transferring the Mortgage was an additional Security for the Satisfaction only of the Lender, and not intended to alter the Nature of the Debt.

From hence, as it ſeems, it may be inferred, that if a Feme Sole makes a Mortgage, and receives the Money, and marries, and then the Mortgage is transferred, the Huſband joining in the Aſſignment, and covenanting to pay the Money, the Wife, or the Heirs of the Wife, upon the Death of the Huſband, ſhall not compel an Application of the Huſband's perſonal Eſtate for the Payment of this Mortgage-Money. *Secus* if the Huſband had received this Money.

Caſe 93.

Lord Chancellor Cowper.

Dean and Chapter of Dublin verſus *Dowgatt.*

Whether Error lies on a Rule, or Award of a *Mandamus.*

THE Arch-deacon of *Dublin* moved for a *Mandamus* in the Court of King's Bench in *Ireland*, to be directed to the Dean and Chapter of *Dublin*, commanding them to admit him to a Stall in the Cathedral Church of *Dublin*, and to a Vote in the Chapter.

And upon that Motion, and Arguments thereon, the Court of *B. R.* there granted firſt a *Mandamus*, then an *Alias*, and at laſt a peremptory *Mandamus*.

Afterwards the Dean and Chapter brought a Writ of Error iſſuing out of the Court of Chancery here, and returnable in the Court of *B. R.* at *Weſtminſter*; and it was moved, in regard the King's Bench in *Ireland* had not made any Return to the Writ of Error, that the Court of Chancery would order them to make their Return, and in the mean Time to ſtay all the Proceedings upon the *Mandamus*.

For which Purpoſe it was inſiſted, 1*ſt*, That a Writ of Error was a Writ of Right, and the King's Writ, and the only Remedy that the Subject had to be redreſſed, when wronged by the erroneous Proceedings in an Inferior Court; as the Court of King's Bench in *Ireland* was, with Reſpect to the Court of King's Bench in (*a*) *England*.

(*a*) Vide 2 Vol. 262. *Sir Jo. Fryer* verſus *Barnard*.

2*dly*, That if a Writ of Error did not lie in this Caſe, on Account of its not being a Judgment, but only a Rule upon a Motion; yet the Court of *B. R.* in *Ireland* ought to return this; like the Caſe, where the Statute of 21 *Jac.* 1. *cap.* 23. ſays, "That after Iſſue "joined, a *Habeas Corpus* ſhall not remove a Cauſe out "of an Inferior Court", ſtill the Inferior Court ought to make their (*b*) Return to the Court from whence the *Habeas Corpus* iſſued, of the ſpecial Matter, tho' they have Liberty to proceed notwithſtanding.

(*b*) Carthew 69. *Watſon* verſus *Clark*.

3*dly*, That upon a *Mandamus*, ſince the Statute relating to *Mandamus's* (*c*), which allows ſpecial Pleadings to it, it is plain Error lies; but however, there ought to be a Return to the Writ.

(*c*) 9 Annæ, cap. 20.

On the other Side it was ſaid, that it was very true, ſince the Statute which allows ſpecial Pleadings to a *Mandamus*, Error lay of a Judgment thereon; becauſe it is now in the Nature of an Action, and Coſts are given by the Statute for that Side which prevails.

But this is no Argument that Error lies of a *Mandamus* where there is no Plea to it, and only a Rule awarded for the *Mandamus*, which is not in Nature of a Judgment.

That the late Statute of *Mandamus's* did not extend to *Ireland*; ſo that there could be no ſpecial Pleadings, by way of Replication to it, as now there may be in *England*.

That this was like a Prohibition granted upon a Motion, of which no Writ of Error lies; as was adjudged in the Houſe of Lords in the Biſhop of S. *David's* Caſe, who moved for a Prohibition in the King's Bench to ſtay the Proceedings in the Archbiſhop's Court, in order to his Deprivation, and the Court of King's Bench denied it; and on that, the Biſhop of S. *David's* brought Error in the Houſe of Lords, who held it did (*a*) not lie; which was apprehended to be the ſame Caſe. But if there was a Declaration upon a Prohibition, and Judgment given thereupon, in ſuch Caſe Error would lie.

(*a*) Salk. 136.

But it being ſaid, the Court of *B. R.* in *Ireland* were diſpoſed to ſhew all Obedience and Reſpect to the Court of Chancery, and only deſired Time to conſider what to return, doubting whether this Writ of Error lay, and that they would ſubmit, until they ſhould make a Return to the Writ of Error, to ſtay Proceedings upon the *Mandamus*; the Court gave them their own Time.

On this Occaſion *Parker* C. J. (who together with C. J. *King*, and C. B. *Bury*, were deſired by Lord Chancellor *Cowper* to aſſiſt at the Motion,) ſaid, that the Court of Chancery might ſuperſede this Writ of Error *quia improvidè emanavit*, if it were ſo.

Writ of Error of a Judgment on a *Mandamus*, no *Superſedeas* to a peremptory *Mandamus*.

Alſo he ſaid, that a *Mandamus*, ſince the late Statute, was in the Nature of an Action, ſpecial Replications, and Pleadings therein being admitted, and Coſts given to either Side that prevailed:

And that a Caſe had happened in the King's Bench, where Judgment was given upon ſpecial Pleadings upon the late Statute, for the *Mandamus*, and the Defendant brought Error, and it was admitted Error lay; yet this was held to be no *Superſedeas* to the peremptory *Mandamus*; for that ſuch a Conſtruction would quite defeat the End of the Statute, and prevent the Officer, who was choſen annually, from having any Fruit of the *Mandamus*.

And *King* C. J. took Notice, that the Words of the Statute were, that in caſe Judgment were given for the *Mandamus*, a (*a*) peremptory *Mandamus* ſhould be granted without Delay.

(*a*) Vide Sect. 2.

DE

Term. S. Trinitatis,

1717.

Caſe 94.
Lord Chancellor Cowper.

Vane verſus *Fletcher*.

SIR *Henry Fletcher*, having a conſiderable Eſtate in Fee-ſimple in *Cumberland*, and being converted to the Popiſh Religion, conveyed his Eſtate by Settlement to Truſtees in Fee, in Truſt that he ſhould have a Rent-Charge thereout for his Life, and then in Truſt to ſecure his Siſters Portions; and afterwards to the Uſe of *Henry Fletcher*, a remote Relation and a Papiſt, for ninety-nine Years, if he ſhould ſo long live; Remainder to the Truſtees and their Heirs during the Life of the ſaid *Henry Fletcher*, to preſerve contingent Remainders, Remainder to his firſt and other Son in Tail Male; and for Want of ſuch Iſſue, to Sir *Henry*'s Nephew *Richard Vane* for his Life, and ſo to his firſt, *&c.* Son in Tail Male, upon Condition to change his Name from *Vane* to *Fletcher*, with Remainders over.

Sir *Henry Fletcher* died without Iſſue, and *Henry Fletcher* the Papiſt had no Iſſue, and *Richard Vane* the Remainder-man, together with the Siſters and Heirs at Law of Sir *Henry Fletcher*, brought their ſeveral Bills, ſetting forth, that *Henry Fletcher*, being a Papiſt, was by the Act of the 11 & 12 *W.* 3. *cap.* 4. *ſect.* 4. diſabled to take any real Eſtate, or any Truſt thereout; wherefore their reſpective Bills prayed, that the reſpective Plaintiffs ſhould be let into the Poſſeſſion of the Premiſſes.

Lord Chancellor at firſt inclined to direct an Iſſue to try, whether *Henry Fletcher* was a Papiſt at the Time that this Remainder ſhould have veſted in him; and this was deſired by the Plaintiffs; but in regard the Act of Parliament inflicted a Forfeiture and Diſability, (for which Reaſon it was to be taken ſtrictly,) and the ſaid *Henry Fletcher* being above eighteen Years of Age at the Time of the making of the Settlement, and ſo not within the Clauſe of retrieving the Eſtate, by returning to the Proteſtant Religion, (which probably was (*a*) intended by the Parliament,) his Lordſhip would not aſſiſt the Plaintiffs ſo far, as to direct an Iſſue to try, whether the ſaid *Henry Fletcher* was a Papiſt at the Time when the Settlement was made; but left the Heir at Law, and the Remainder-man, to go on and try their Ejectments upon ſeveral Demiſes; and directed, that none of the Truſt-Terms, or Eſtates in the Settlement, previous to the ſaid Eſtate limited to *Henry Fletcher* the Papiſt, or meſne betwixt the Papiſt and Mr. *Vane* the Remainder-man, ſhould be given in Evidence, or inſiſted upon; to the Intent it might be tried, whether *Henry Fletcher*, who was ſtrongly affirmed to be a Papiſt, (but had on the other Side controverted it,) was capable of taking or not; and who had the Title, in caſe *Henry Fletcher* the Papiſt was not capable of taking; the Remainder-man inſiſting, that the Limitations to the Papiſt being void, therefore *he* was to take preſently; and the Heir inſiſting, that the Remainder-man was not to take until *Fletcher* the Papiſt ſhould be dead without Iſſue; and that in the mean Time the Eſtate ſhould deſcend to the Heir, as undiſpoſed of by the Perſon that made the Settlement.

Equity not to aſſiſt any one to take Advantage of a Forfeiture.

(*a*) Vide 2 Vol. 6. the Caſe of *Hill* verſus *Filkin*, & Lord *Maccleſfield*'s Opinion therein.

By the Statute againſt the Growth of Popery, Papiſt under eighteen diſabled to take only till Conformity, if above eighteen, diſabled for ever.

It is remarkable, that the Clauſe of the Statute of 11 & 12 *W.* 3. made to prevent the Growth of Popery, which ſays, "The next of Kin, that is a Proteſtant, ſhall enter and enjoy the Lands during the "Life of the Papiſt, or until he ſhall conform", extends only to the Caſe, where the Papiſt is under eighteen at the Time that any Lands come to him; but where the Papiſt is above eighteen when the Lands come to him, or in Truſt for him, ſuch Papiſt is utterly diſabled to take, and the Eſtate void; ſo that in the principal Caſe, *Henry Fletcher* the Papiſt being above eighteen at the Time when the Limitation was made to him, his next of Kin made no Pretenſion to the Eſtate in Queſtion.

Voluntary Conveyance of a Copyhold, or other Eſtate, not helped in Equity againſt the Heir.

Alſo in this Caſe, there were certain Cuſtomary or Copyhold Lands, held of the Borough of *Cockermouth*, which the ſaid Sir *Henry Fletcher* was ſeiſed of, and which could not paſs, but by Surrender.

And on Behalf of *Henry Fletcher*, it was ſaid, that Sir *Henry* had done all that lay in his Power to ſurrender them, for he had made a Letter of Attorney to *J. S.* to ſurrender the Premiſſes, and the Steward or Tenants refuſed to accept them, inſiſting, that they ought to keep the Letter of Attorney; upon which they broke off, and no Surrender was made. But

Lord Chancellor thought this a lucky Accident in Favour of the Heir, which Equity ought not to deprive him of, any more, than if the Copyholder and the Lord had diſagreed about a Fine, which had prevented a Surrender; and that this being a voluntary Conveyance was not to be aſſiſted in Equity, like the Caſe of a Conveyance to a (*a*) Wife or Child. But if the Heir at Law had himſelf done any Thing to have prevented the Acceptance of the Surrender, that had been material.

Beſides, after all, it did not appear in this Caſe, that Sir *H. Fletcher* had done all in his Power for the making the Surrender; for which Reaſon the Title to the Copyhold Premiſſes was declared by the Court to be in the Heir.

Pooley & al' verſus *Ray*.

Caſe 95.

SIR *John Cordell*, ſeiſed in Fee of a conſiderable Eſtate in *Suffolk*, was indebted to *Clement Ray* the Steward of his Courts, and who was an Attorney at Law, in 400 *l.* by Mortgage dated the 1 *Jan.* 1701, taken in the Name of *William Taylor*; and afterwards Sir *John Cordell* in *May* 1704. died without Iſſue, leaving his two Siſters, *Elizabeth King*, and *Margaret Firebraſs*, his Heirs at Law.

A Mortgage comes to an Executor, who receives the Mortgage Money, and pays it away to his Teſtator's Creditors; afterwards it appears, that the Mortgage had been ſatisfied in the Teſtator's Life-time; the Executor muſt refund, tho' he had before paid the Money away in Debts, which he had not otherwiſe Aſſets to pay.

Elizabeth King died leaving an Infant Son, now one of the Plaintiffs, but by her Will deviſed her Moiety of the Eſtate to two Truſtees, the Plaintiff *Pooley* and one *Golding*, in Fee, in Truſt to join with the other Siſter *Margaret*, to raiſe by Sale, Mortgage, *&c*, of ſo much of the Eſtate as was neceſſary, Monies ſufficient for the Payment of her Brother's (Sir *John*'s) Debts.

The

(*a*) Tho' ſee ante 60. *Watts* verſus *Bullas*, where a voluntary defective Conveyance to a Brother of the Half Blood was made good by this Court againſt the Heir.

The Creditors of Sir *John Cordell* brought a Bill againſt the Truſtees *Pooley* and *Golding*, to have a Sale for Payment of their Debts.

And on hearing of the Cauſe, the —— of the late Queen, an Account was decreed to be taken of Sir *John*'s perſonal Eſtate; and if that ſhould not be ſufficient to pay the Debts, then the Truſtees were to join in a Sale or Mortgage to raiſe what Money was requiſite, and all the other Creditors of Sir *John Cordell* were to come in before the Maſter, to prove their Debts.

In *April* 1709. *Clement Ray* the Mortgagee died, leaving his Brother the Defendant *Iſaac Ray* Executor, who coming before the Maſter, and not admitting any of his Mortgage-Money to be paid, proved the Execution of the Deed, and ſo got a Report for his whole Principal and Intereſt as due; which Report was afterwards confirmed and made abſolute; and the Money amounting to 700 *l.* was all of it, on the third of *November* 1711. paid by the Truſtees.

Afterwards it appeared by a Copy of an Account, under *Clement Ray*'s own Hand, that 353 *l.* 13 *s.* 1 *d.* had been paid by Sir *John Cordell* in his Life-time.

Upon this, the Truſtees and Infant bring a Bill to be relieved againſt this Over-payment. The Defendant pleaded the former Decree, Report, and Proceedings; but, it being the Caſe of an Infant, the Plea was over-ruled.

Then the Defendant anſwered and inſiſted, that before any Notice of the Plaintiff's Demand on Account of this Over-payment, the Defendant, as Executor of *Ray*, had paid away this 700 *l.* in the Debts of his Teſtator.

Maſter of the Rolls: Let the Maſter ſee, whether there has been a double Payment; and as to ſo much as has been over-paid, it muſt be allowed to the Plaintiffs, and paid back by the Executor of *Ray*; and the Executor to be at Liberty to ſue ſuch Creditors, as through Miſtake he has paid, to make them refund.

And there being an Appeal from this Decree to the Lord Chancellor *Cowper*, his Lordſhip affirmed the Decree, declaring, that tho' this might be a hard Caſe, yet if the Plaintiffs had a Right to be repaid their Money, which they had over-paid on the Mortgage, this Right could not be overthrown by the Defendant the Executor's applying the Money in any Manner he ſhould think fit; any more, than if an Executor at Law ſhould recover a Debt, and pay the Teſtator's Debts with it, and afterwards this Judgment recovered by the Executor is reverſed in Error; the Executor muſt reſtore the Money to the Plaintiff in Error; and his having paid it away in Debts of his Teſtator, will not excuſe him from paying it back.

So in the ſame Manner, if there were a Decree for the Executor to be paid a Sum of Money by the Defendant, and the Executor, having received the Money, pays it away in Debts; and then the Defendant, againſt whom the Executor had recovered the Decree, brings an Appeal, and reverſes the Decree; the Plaintiff in the Appeal ſhall be reſtored to the Money.

Secus if the Defendant had delayed the Appeal, and willingly ſtood by, whilſt the Executor paid away this Money to the Teſtator's Creditors; for this would be drawing the Executor into a Snare; but nothing of this Kind appearing in the preſent Caſe, affirm the Decree.

Caſe 96.

Baſſet verſus *Clapham.*

Sir Joſeph Jekyll *Maſter of the Rolls.*

Truſtees to preſerve contingent Remainders in a voluntary Settlement, decreed to join in a Sale for Payment of Debts.

ONE after Marriage makes a voluntrary Settlement of his Lands to himſelf for Life, Remainder to Truſtees to ſupport contingent Remainders, Remainder to his firſt, *&c.* Son in Tail ſucceſſively, Remainder to himſelf in Fee; and contracting Debts, he afterwards makes a Conveyance of his Eſtate to other Truſtees for Payment of theſe Debts.

The Creditors bring a Bill, and (*int' al'*) inſiſt, that the Truſtees for preſerving contingent Remainders ſhould join in the Sale to deſtroy the contingent Remainders; and this came on by Conſent before Sir *Joſeph Jekyll*, who took Time to conſider of it, alledging, that though in the Caſe of Sir *Thomas* (*a*) *Tippen*, where Truſtees had joined in cutting off Remainders created by a voluntary Settlement, the Court, on a Bill brought by a remote Relation, had *refuſed to puniſh* them, as diſtinguiſhing betwixt a voluntary Settlement, and one made on a valuable Conſideration; yet he had not known a Precedent, where the Court ever *decreed* the Truſtees to join in deſtroying the contingent Remainders; this being the (*b*) Reverſe of the Purpoſe for which they were at firſt inſtituted.

(*a*) *Tippen* verſus *Piggot*, Mich. 1713.

(*b*) Ante 129. *Pye* verſus *Gorge*. Poſt *Elſe* verſus *Osborn*, 388. & *Manſel* verſus *Manſel*, 2 Vol. 610.

But this Cauſe coming on in *Auguſt* 1717, and a Precedent being ſhewn, where ſuch a Decree was pronounced, his Honour decreed, that the Truſtees ſhould join to deſtroy the contingent Remainders, and be indemnified, it being at the Suit of Creditors, and for raiſing of Money for Payment of Debts.

(*a*) Cited poſt 537. in *Winnington* verſus *Foley*.

Note; Sir *Thomas Tippen*'s Caſe (*a*) was, where upon a Marriage, a Settlement was made by a third Perſon, to the Uſe of the Husband for ninety-nine Years, Remainder to Truſtees during the Life of the Husband, to ſupport contingent Remainders, Remainder to the Wife for Life, Remainder to the firſt, *&c.* Son of the Marriage, Remainder to the Heirs of the Body of the Husband, Remainder to the right Heirs of the Husband; there was no Iſſue of the Marriage, and the Remainder in Fee being contingent, in regard the Limitation to the Husband was for Years only, and the Eſtate not moving from the Husband, (for if it had, the Remainder limited to the Right Heirs of the Husband would have been the old Reverſion,) the Truſtees joined to deſtroy this contingent Remainder.

And on this Caſe being cited, it was ſaid by the Maſter of the Rolls, that if a Son had been afterwards born, it would have been a Breach of Truſt; but this Remainder to the right Heirs of the Husband, being a remote Limitation, and not within the Conſideration of the Settlement, and voluntary, Equity would not puniſh it as a Breach of Truſt.

Caſe 97.
At the Rolls.

Hayter, Heir of Ambroſe Pile, Plaintiff;
Rod, ——————— *Defendant.*

(*Argument for the Plaintiff Hayter a Pauper.*)

A. ſeiſed in Fee demiſes to *B.* his Executors, &c. for ninety-nine Years, in Truſt for himſelf and his Wife for their Lives and the Life of the Survivor, and after the Death of the Survivor, in Truſt for the Heirs of their two Bodies; and in Default of ſuch Iſſue, then in Truſt for the Heirs of the Body of the Husband; and in Default of ſuch Iſſue, in Truſt for the Heirs of the Survivor of the Husband and Wife. Husband and Wife have Iſſue a Son, and the Husband dies, and then the Son dies in the Life of the Mother without Iſſue, the Mother adminiſters to her Husband and Son, and aſſigns this Term to the Defendant. Decreed her Aſſignee well intitled, and that the Term ſhould not go to the Heir of the Husband as Attendant on the Reverſion.

*A*Mbroſe Pile had a Wife *Margaret*, and being ſeiſed in Fee of an Eſtate in *Herefordſhire*, by his Indenture of Demiſe dated 20 *Auguſt* 1670. demiſes the Premiſſes to a Truſtee (*William Abraball*) his Executors and Adminiſtrators for ninety-nine Years, in Truſt for himſelf and his Wife *Margaret* for their Lives and the Life of the Survivor, and after the Death of the Survivor, in Truſt for the Heirs of their two Bodies; and in Default of ſuch Iſſue, then in Truſt for the Heirs of the Body of *Ambroſe Pile* the Husband; and in Default of ſuch Iſſue, in Truſt for the Heirs of the Survivor of the Husband and Wife.

The Husband and Wife have Iſſue one Son *James Pile*, the Husband *Ambroſe Pile* dies; afterwards

The Son *James Pile* dies in the Life of the Mother, being an Infant, and without Iſſue.

Margaret Pile the Mother, having adminiſtred, as well to her Husband, as to her Son, aſſigns this Term of ninety-nine Years to the Defendant *Rod*; whereupon, The Queſtion is, who is intitled to the Truſt of this Term? Whether it is attendant on the Reverſion, and conſequently belongs to the Plaintiff who is Heir at Law of this *Ambroſe Pyle*, and is intitled to the Reverſion in Fee expectant on this Term; or whether the Defendant *Rod* be intitled thereto, as Aſſignee of *Margaret* the Wife, who appears to have adminiſtred as well to her Huſband, as her Son?

And, I take it, the Plaintiff as Heir at Law of this *Ambroſe Pyle*, as he is intitled to the Reverſion, ſo is he intitled to the Truſt of the Term, and that this Term, in Equity, is attendant on the Reverſion.

In ſpeaking to this Matter, I would beg leave to conſider,

1ſt, That this is not a Term in *Groſs*, but a Term created *de novo*, created by him, who, at the ſame Time, had the Inheritance, and conſequently diſtinguiſhable in Law from the Former.

2dly, That Equity favours that Conſtruction, by which Terms are looked upon as attendant on the Inheritance.

3dly, That, in this Caſe, the Truſts declared touching this Term (excepting ſuch Truſts only as are void) are all determined; and that therefore this Term ſhall attend the Inheritance.

4thly, That in this Caſe, the Words appointing the Remainder to the Heirs of the Body of the Huſband and Wife are good Words of Purchaſe, and not of Limitation, it being in Caſe of a Truſt of a Term.

And, in the laſt Place I ſhall mention ſome Caſes which, in my Apprehenſion, come up to the Principal Caſe, and in which Terms have been decreed to attend the Inheritance.

1*ſt*, Then I would obſerve, that the Law itſelf diſtinguiſhes betwixt a Term created *de novo*, and a Term in *Groſs*.

In 10 *Co.* 87. (*Leonard Love*'s Caſe,) and 1 *Rol. Abr.* 831. *Pla.* 2. it is adjudged, that if one ſeiſed in Fee of Land, deviſes it to *J. S.* and the Heirs Male of his Body for 500 Years, though this Term ſhall go to the Executors and Adminiſtrators of *J. S.* and not deſcend to the Heirs Male of the Body of *J. S.* yet when *J. S.* the Deviſee of the Term dies without Iſſue Male, the Term ſhall ceaſe, for the Benefit of the Teſtator's Heir at Law.

But the Law is plainly otherwiſe in Caſe of a Deviſe of a Term in *Groſs*; and therefore in 1 *Rol. Abridg.* 831. *Pla.* 1. *Leventhorp* and *Aſhbey*, where *A.* poſſeſſed of a Term of 500 Years, deviſes it to *B.* and the Heirs Male of his Body, here, though *B.* the Deviſee dies without Heirs Male of his Body, yet the Term ſhall continue in *B.*'s Executors, and ſhall not revert for the Benefit of the Teſtator's Executors, as in the former Caſe, it will ceaſe for the Benefit of the Heir. So that it is plain, even the Law diſtinguiſhes betwixt a Term created *de novo* out of an Inheritance, (which is the preſent Caſe) and a Term in *Groſs*.

I muſt admit, that in the principal Caſe, the Term itſelf for ninety-nine Years is not determined, but is now in Being, it being an abſolute Term at the Time of its Creation.

But what I rely upon, is, that though the Term itſelf is not determined, yet all the Truſts declared touching it, are at an End; and that therefore the Term ſhall, in Equity, attend the Inheritance, which is the ſame Thing, with Regard to the equitable Conſideration of it, as if the Term itſelf were determined, and conſequently that it belongs to the Plaintiff who has the Inheritance.

In the next Place I would take Notice, that Equity favours the Conſtruction, whereby Terms for Years are looked upon as attendant on the Inheritance.

The creating of theſe long Terms is a diſmembering of the Inheritance, and a creating of Fractions of Eſtates; but when Equity conſtrues the Term to be attending upon the Inheritance, this is again uniting the Term to the Reverſion, and reſtoring it to the Inheritance, from whence it was before taken. And Reſtitutions are always favoured at Law as well as in Equity.

Beſides, conſtruing a Term to attend the Inheritance, is an Interpretation in Favour of the Heir at Law; and an Heir both in Law, and Equity, is preferred to an Executor, or Adminiſtrator; an Heir muſt be of the Blood of the Anceſtor from whom he claims to inherit; nay, he muſt be of the whole Blood, for being of the half Blood will not ſerve his Turn; but an Executor, or Adminiſtrator, may not be of the Blood at all, but may chance to be a mere Stranger.

An Heir is preferr'd to an Executor.

I ſhall only cite one Caſe in Law, and one in Equity, in Relation to this Matter, *viz.* that an Heir is preferred to an Executor.

In 3 *Levinz* 47. *Holt* verſus *The Biſhop of Wincheſter*, there is this Caſe: An Incumbent of a Church purchaſes the Inheritance of the Advowſon and dies, and the Diſpute being betwixt the Heir and Executor, who ſhould preſent to the Church?

It was objected for the Executor, that the Advowſon did not deſcend to the Heir, until *after* the Death of the Incumbent; whereas *by* the Death of the Anceſtor the Church became void, and by this Means the Avoidance was ſevered from the Inheritance, and veſted in the Executor, as a Flower fallen.

But adjudged, in Favour of the Heir, that all was but as one Inſtant, and where thoſe two Titles concur in one Inſtant, the Heir ſhall be preferred, as claiming under the Elder Right.

And as the Law prefers an Heir to an Executor, even where there is a Concurrence of Right, ſo *Æquitas ſequitur Legem*, as every Day's Experience ſhews, that an Heir ſhall compel the Perſonal Eſtate out of the Executor's or Adminiſtrator's Hands, in Aid of the real Eſtate, to exonerate and clear the latter; which is a plain Proof, that the Heir, in Equity, is (*a*) more favoured than the Executor, or Adminiſtrator.

(*a*) Vide 174, *Lingen* verſus *Sowray*, and poſt *Chaplin* verſus *Horner*, 483.

But in the next Place (and what I pretty much inſiſt on) it is to be obſerved, that the Truſts declared concerning this Term of ninety-years (ſuch of them I mean as are not merely void) are all determined, and conſequently, when the Truſts declared concerning this Term are all determined, the Term ſhall attend the Inheritance.

It will, I preſume, be admitted, that if I am ſeiſed in Fee, and make a Leaſe for ninety-nine Years, without any Conſideration, and continue in Poſſeſſion, and declare no Truſt concerning the Term, this Leaſe will be in Truſt for me and my Heirs, a Truſt attending upon the Reverſion and Inheritance.

And if this be ſo, where a long Term is created, and no Truſt declared, it brings me ſomewhat nearer the Principal Caſe, (*viz.*) If a Man ſeiſed in Fee, creates a Term for ninety-nine Years, and declares *ſome* Truſts of the Term, (*viz.*) in Truſt for himſelf for Life, and afterwards in Truſt for his Wife for Life, and there ſtops without declaring any further Truſts; it ſeems plain, and has been reſolved, in Equity, that after the Truſts that are declared, ſhall be expired, the Term ſhall, from thenceforth, be attendant on the Inheritance.

This brings me to the very Caſe now before the Court, (*viz.*) that where a Man is ſeiſed in Fee, and creates a Term for ninety-nine Years, in Truſt for himſelf for Life, and afterwards to his Wife for Life, and afterwards upon ſeveral other Truſts, that are apparently void; theſe void Truſts, are as no Truſts, and it is the ſame Thing as if, after the Truſts limited to the Husband and Wife for their Lives, no Truſts at all had been declared; for declaring a void Truſt, is declaring no Truſt.

Then I ſay, that in the Principal Caſe all the Truſts declared by this Deed, expectant upon the Death of the Husband and Wife, are void, either by Accident, or elſe they were originally void even in their Creation; and for this Purpoſe I muſt beg leave juſt to repeat them.—— The Husband, who created this

Term of ninety-nine Years, declares the Truſt thereof to be to himſelf and his Wife, for their Lives and the Life of the Survivor; this is good; and after the Death of the Survivor, then in Truſt for the Heirs of the Bodies of the Husband and Wife.

Now this was a contingent Truſt, and would have been good, if there had happened to be ſuch a Perſon, as was Heir of both the Bodies of Husband and Wife: But then it muſt have been ſuch an Iſſue of both their Bodies, as ſhould have ſurvived them both, for *Nemo eſt hæres viventis*; but *James Piles*, the only Iſſue of the Marriage, dying after the Father, and in the Life-time of the Mother, he could not take as Heir of both their Bodies, and therefore this Limitation, which might by *Poſſibility* have been good, became by *Accident*, void.

The next Limitation is in Default of ſuch Iſſue, (*viz.*) in Default of Iſſue of the Bodies of the Husband and Wife, then in Truſt for the Heirs of the Body of the Husband *Ambroſe Pile*; but this is a void Limitation; becauſe it is a Limitation of a Truſt of a Term, after a Failure of Iſſue of the Bodies of the Husband and Wife.

That a Limitation over of a Truſt of a Term, after a Failure of Iſſue, is void, is a *Principle* in Law.

An Eſtate-tail is ſuch an Eſtate, as, in Notion of Law, may indure for ever; for which Reaſon at Common Law, before the Statute *de donis*, if a Man gave or deviſed Lands to another, and the Heirs of his Body, the Donor could limit no Remainder over; the Donor himſelf had but a (*a*) Poſſibility, which he could not limit over; much leſs can a Truſt of a Term bear ſuch a Limitation.

(*a*) 1 Inſt. 22. & ante 74.

This

This was admitted in the Duke of (*a*) *Norfolk*'s Caſe, and in *Pollexfen*'s Reports, from *fol.* 24 *to fol.* 44. there are thirteen ſolemn Reſolutions, moſt of them with the Aſſiſtance of the Judges, and many of them ſtronger than the principal Caſe, and in all of which it is ſolemnly decreed, that a Limitation of a Term, after a Failure of Iſſue, is void.

(*a*) Vide Caſes in Chancery, Part 3.

The next Limitation is, to the Heirs of the Survivor of the Husband and Wife, (*viz.*) *Ambroſe Pile* and *Margaret* his Wife.

But this Limitation of the Truſt of the Term is ſtill more plainly void, it being expectant on the Determination of two Eſtates-tail; this is one remote Poſſibility upon another, and therefore clearly void, ſo as to have no Appearance of a Doubt.

From whence it is evident, that all the Truſts declared concerning this Term are determined.

1*ſt*, The Truſts for the Husband and Wife for their Lives, are determined by their Death.

The next Limitation to the Heirs of their two Bodies was contingent, and proved to be void, becauſe there happened to be no Heir of both their Bodies.

The ſubſequent Limitations were always and originally void, they being expectant on a Failure of Iſſue, and conſequently there being no Truſt ſubſiſting that was declared touching this Term, the ſame ſhall attend the Inheritance out of which it was *de novo* created.

As to what the Court was pleaſed to object, that ſince the Caſes of (*b*) *Burchett* and *Durdant*, and that of

(*b*) 1 Vent. 334. 2 Vent. 311.

of *Specot*, in the Houſe of Lords, it was become Matter of Doubt, whether the Words [Heirs of the Bodies of the Husband and Wife] ſhould be taken in that ſtrict Senſe, ſo as to require the Husband and Wife to be both dead, before there could be an Heir of their Bodies; I take it, neither of thoſe Caſes come up to this: In *Burchett* and *Durdant*'s Caſe, the Deviſe was to the Heirs of the Body of *J. S.* now living, which Words [now living] deſcribed the Perſon, and ſhewed the Teſtator to have meant no more, than an Heir apparent; but in the principal Caſe, there are no ſuch Words as [now living], nor any Words tantamount.

(*a*) Ante 229.

As to the Caſe of *Specot*, (oftner called (*a*) *Long* and *Beaumont*,) where a Deviſe was, (after ſeveral other precedent Limitations,) to *A.* for ninety-nine Years, if he ſhould ſo long live, Remainder to the firſt and every other Son of *A.* in Tail Male, Remainder to the Heirs Male of the Body of his (the Teſtator's) Aunt *Eliz. Long* lawfully begotten; and in Default of ſuch Iſſue, to his own right Heirs; the Teſtator by the ſame Will taking Notice that his Aunt *Elizabeth Long* was living, and giving her a Legacy; where the Court of Exchequer (except Baron *Bury*) held the eldeſt Son of *Elizabeth Long* ſhould take:

This Judgment was reverſed in *Cam' Scacc'*, and that Reverſal reverſed in the Houſe of Lords; but the Reaſons of the Judgment which prevailed ſeemed to be, for that tho' the Lands were deviſed to the Heirs Male of the Body of *Elizabeth Long* lawfully begotten, yet the Will took Notice, that *Elizabeth Long* was at that Time living, and in Default of ſuch Iſſue of *Elizabeth Long*, the Remainder was to go to the Teſtator's right Heirs.

As to the Objection which the Court made, that the Perſon creating this Term *de novo*, had as abſolute a Power over the Truſt of the Term, as over the Term it ſelf, and might ſever it from the Inheritance, and give it to the Wife; that muſt be admitted; but then it muſt be by proper Words, ſuch as are not here; the Truſt of the Term might, without Doubt, have been limited to the Huſband and Wife, and the Survivor, and the Executors and Adminiſtrators of the Survivor; or to the Huſband and Wife, and to the Executors and Adminiſtrators of the Wife; but, in this Caſe, nothing is limited to the Heirs of the Survivor, (who was the Wife,) but in Default of Iſſue of the Marriage, and alſo in Default of Iſſue of the Body of the Huſband; and this Limitation is void.

The next Thing I would beg Leave to conſider is, whether, when a Truſt of a Term is limited to the Huſband and Wife for their Lives, Remainder to the Heirs of their two Bodies, the Words [Heirs of their two Bodies] are Words of *Limitation*, and ſo void in caſe of a Truſt of a Term; or whether they are not good by Way of *Deſcriptio perſonæ*.

And I apprehend, that the Heir of their Bodies ſhall take by Way of *Deſcriptio perſonæ*.

I admit the Caſe of *Peacock* and *Spooner* (*a*) was, that the Father poſſeſſed of a Term aſſigned it over to Truſtees, in Truſt for his Son for Life, Remainder to his Son's Wife for Life, Remainder in Truſt for the Heirs of the Body of his Son's Wife by the Son; this Caſe came on firſt before Lord Chancellor *Jeffereys*, and he decreed the Remainder to the Heirs of the Body to be void, and that the whole veſted in the Wife, which ſhould therefore go to her Executors or Adminiſtrators.

(*a*) 2 Vern. 43.

(a) 2 Vern. 195.

Afterwards it came before the Lords (a) Commiſſioners, and they reverſed the Lord *Jeffereys*'s Decree; it went at laſt into the Houſe of Lords, who affirmed the Decree of Reverſal, and held the Remainder limited in Truſt for the Heirs of the Body of the Wife, to be good, by way of Deſcription of the Perſon.

But I apprehend, the Reaſon of that Reſolution was, not, as was hinted by the Court, for that this was within the Equity of the Statute of *H.* 7. made againſt Jointreſſes diſcontinuing, or barring Eſtates limited to them *ex proviſione viri*, or of his Anceſtors:

For ſurely, the Statute of *H.* 7. extends only to Freehold Eſtates; it was made to prevent the Jointreſs from diſcontinuing the Eſtate ſettled upon her, or the Remainders limited thereupon; but a Tenant for Years could not make any Diſcontinuance. The Statute of *H.* 7. was made to prevent Jointreſſes from levying Fines, or ſuffering Common Recoveries for the barring of the Iſſue, or the Remainder; but a Tenant for Years could never levy a Fine, or ſuffer a Common Recovery, and therefore a Term for Years could not be within that Statute. And tho' this Caſe of *Peacock* and *Spooner* was ſo much agitated, and ſo often ſpoke to, by the greateſt Counſel of that Age, yet none of them, according to the Account I have of the Caſe, ever made uſe of it as an Argument to ſupport the Remainder limited to the Heirs of the Body of the Wife by the Huſband, that this was good within the Equity of the Statute of *H.* 7.

But the ſubſtantial Reaſon ſeemed to be, that where the Truſt of a Term is limited to the Huſband and Wife for their Lives, Remainder in Truſt for the Heirs of the Body of the Wife by the Huſband, this is good by Way of *Deſcriptio perſonæ*; and the ſame Thing, as if the Truſt of the Term, after the Death of the Huſband and Wife, had been limited to ſuch Perſon as ſhould be the Heir of the Body of the Wife, by the Huſband.

If the Remainder had been ſo limited, and in thoſe Words, it would ſurely have been good; and it being in caſe of a Truſt, where the Intention of the Parties is regarded, Equity will conſtrue it, as if the Limitation had been expreſſed in ſuch Words.

I admit, in Caſe of a Freehold (*a*) Eſtate the Rule is, that if the Eſtate be limited to the Anceſtor for his Life, with an immediate, or mediate Remainder to the Heirs of the Body of the Tenant for Life, theſe are Words of Limitation:

(*a*) 1 Inſt. 22 *b*. 319. *b*. 1 Rep. 104. *Shelley*'s Caſe; Poſt in 399, *Good-right* verſus *Wright*, and in *Attorney General* ver. *Sutton*, 757.

But in that very Caſe put, if the firſt Limitation be to the Anceſtor for ninety-nine Years, if he ſo long live, Remainder to Truſtees during his Life, Remainder to the Heirs of his Body; now theſe Words are not Words of Limitation, but of Purchaſe; and this is more like the principal Caſe.

Beſides, in the Caſe of a Limitation of a Truſt of a Term to *A.* for Life, Remainder to the Heirs of his Body, in regard a Term, or Truſt of a Term, cannot deſcend to the Heirs of his Body, the Words [Heirs of his Body] are as foreign, and as far from being Words of Limitation, as if the Remainder of the Truſt of the Term had been limited to the Heirs of the Body of any *Stranger*, or third Perſon, and that ſurely had been good.

Subſequent to the Caſe of *Peacock* and *Spooner*, *viz.* in *Trin. Term.* 1699. in Lord *Sommers*'s Time, there (*a*) 2 Vern. 362. Preced. in Chan. 96.

was the Caſe of *Dafforne* verſus *Goodman* (*a*), where one *Bolt*, poſſeſſed of a Term of ninety-nine Years, aſſigned it in Truſt for himſelf for Life, Remainder, as to one Moiety, in Truſt for his Wife for Life, Remainder as to that Moiety in Truſt for the Heirs of the Body of the Wife by him begotten; the Huſband died leaving Iſſue, and then the Wife died, and the Queſtion being betwixt the Heir of the Body, and the Adminiſtrator of the Wife, Lord Chancellor *Sommers* decreed in Favour of the Heir of the Body of the Wife, and that this Remainder was a good Deſcription of the Perſon; and obſerved, that the Decree of *Peacock* and *Spooner* in the Houſe of Lords had ſettled this Point.

(*b*) 2 Vern. 668. Ante 132.

I muſt agree, that after this, in the Caſe of *Webb* and *Webb* (*b*), where a Truſt of a Term was limited to the Huſband for Life, Remainder to the Wife for Life, Remainder to the Heirs of the Bodies of the Huſband and Wife, this Point came before Sir *John Trevor* Maſter of the Rolls, where it was decreed to be a good Limitation; after which it came before Lord *Harcourt*, who held it an ill one; and then the Diſtinction was firſt made, that if the Limitation of the Remainder had been to the Heirs of the Body of the Wife, according to *Peacock* and *Spooner*'s Caſe, it had been good within the Equity of the Statute of *H.* 7. but before, or ſince that Time, I never heard of that Diſtinction; and as to the Weight thereof, I ſubmit it to the Court on what I have ſaid.

And now, admitting for Argument-ſake, that the Truſt of this Term, created *de novo* by the Huſband that had the Fee, had been by way of Words of Limitation, to the Huſband and Wife, and to the Heirs of the Body of the Huſband by the Wife:

I ſubmit it whether, even in this Caſe, if the Inheritance deſcends to the Heirs of the Body, the Term will not attend upon it.

And if once attendant on the Inheritance, it muſt be always ſo.

The Intent of the Party appears to be, that the Truſt of the Term ſhould deſcend; and it is not a naked Term, but there is an Inheritance which may ſupport the Deſcent of it; there is, I believe, no Reſolution againſt it, and therefore I take it that, in Favour of the Heir, the Truſt of the Term ſhall rather go with the Inheritance to the Heirs of the Body of the Huſband, than part from the Inheritance and go to the Executors and Adminiſtrators of the Huſband, and leave a worthleſs Inheritance expectant on a long Term, to deſcend to the Heir.

It is more reaſonable to ſay that, in ſuch a Caſe, where the ſame Man has the Inheritance, and the Truſt of the Term for Years, the Term for Years ſhall give Way to the Inheritance; and ſo in Fact it was ſaid by my Lord *Cowper*, in the Caſe of *Beſt* and *Stamford*, which I ſhall cite preſently.

And now in the laſt place, as to the Caſes on this Head, they are many, and ſome of them (as I take it) ſtronger than the principal Caſe.

If a Man ſeiſed in Fee of Lands, raiſes a Term for Payment of his Debts, without ſaying, that after his Debts paid the Term ſhall ceaſe, or attend the Inheritance, yet Equity of Courſe ſays, that after the Debts paid, the Term ſhall attend the Inheritance, becauſe the Truſt is at an End.

Now in the principal Caſe, the Truſts are at an End, the *Ceſtuique Truſts* being all dead.

Therefore, *pari ratione*, the Term ſhall attend the Inheritance.

In Marriage-Settlements, there are (generally) Terms for Years created for raiſing Portions, and in thoſe Caſes, after the Portions raiſed, the Terms ſhall of Courſe attend the Inheritance; nay, and (which is yet ſtronger) where the Party who was to have the Portion died before it became due, the Court has declared the Term ſhould attend the Inheritance.

If a Man has a Term for Years made to him by way of Mortgage in his own Name, and afterwards purchaſes the Inheritance of the Premiſſes in a Truſtee's Name, it has been decreed, that the Term ſhould attend the Inheritance.

The Caſe of *Holt* verſus *Holt* is much ſtronger than the principal Caſe, where a Man having a Mortgage for Years, and intending to purchaſe the Inheritance, aſſigned the Mortgage to Truſtees, in Truſt for himſelf, his Executors and Adminiſtrators, and purchaſed the Inheritance in his own Name; yet the Truſt of the Term was decreed to attend the Inheritance, tho' aſſigned expreſly in Truſt for his Executors, which ſhewed, nay expreſſed, an Intent, that the Truſt of the Term ſhould go from his Heirs, and to his Executors.

(a) 2 Vern. 520. Preced. in Chan. 522.

I ſhall only add one Caſe more, which is that of (*a*) *Beſt* verſus *Stamford*, it was in *November* 1705. before Lord Keeper *Cowper*, and is in Serjeant *Salkeld's Rep.* 154. A Feme Sole ſeiſed in Fee, on her Marriage with *A.* made a Leaſe to Truſtees for 100 Years, in Truſt for her Husband *A.* for his Life, Remainder in

Truſt for herſelf for Life, Remainder in Truſt for the Children of the Marriage; and for Want of ſuch Iſſue, in Truſt for the Wife, her Executors and Adminiſtrators, (which bears a pretty near Reſemblance to the principal Caſe); the Huſband died, and there was no Iſſue of that Marriage, and the Wife married a ſecond Huſband, and died, and this ſecond Huſband, as Adminiſtrator to the Wife, ſued in Equity for this Term; but decreed by Lord *Cowper*, in this Caſe, that the Truſt of the Term being at an End, it ſhould attend the Inheritance, and ſhould not be for the Benefit of the ſecond Huſband, tho' expreſly limited to go to the Wife's Executors and Adminiſtrators; which is ſtronger than the principal Caſe.

Thus have I humbly laid this poor Man's Caſe before your Honour.

And upon the whole Matter,

As this is a Term created *de novo* by him who at the ſame Time had the Inheritance;

As the Heir is more favoured than the Executor;

As the Conſtruction of making Terms attendant on the Inheritance has prevailed in Equity;

As all the Truſts declared concerning this Term, that are not void at Law, are determined by the Death of all the *Ceſtui que Truſts*;

As the Precedents that have been cited, all of them come up to the Caſe, and ſome go beyond it;

Therefore I hope, for theſe Reaſons, the Term of ninety-nine Years, in the principal Caſe, ſhall attend the Inheritance, and conſequently that this Pauper, who is Heir at Law to this Inheritance, ſhall be intitled to the Truſt of the Term.

Reſolutio Curiæ.

But afterwards the Maſter of the Rolls, on Conſideration of this Caſe, decreed the Title to belong to the Aſſignee of *Margaret Pile* the Wife, and that this Term ſhould not be attendant on the Inheritance; for that the Party, who raiſed this Term, and had Power to ſever it from the Inheritance, ſhewed his Intention ſo to do, by limiting the Truſt to the Survivor of him and his Wife, and the Heirs of the Survivor, which, tho' it was a void Limitation, yet ſufficed to ſhew his Intent to ſever ſuch Term from the Reverſion.

Caſe 98.

Lord Chancellor Cowper.

Attorney General (at the Relation of the Overſeers of Iſlington) verſus *the Brewers Company.*

Coſts not always to follow the Event of the Cauſe; as where though Money was found due to the Defendant upon Account, yet it appearing to be much leſs than had been claimed by the Defendant's Anſwer, in that Caſe the Defendant was allowed no Coſts.

INformation to ſettle a Charity given by Lady *Owen* many Years ſince, whereby ſhe deviſed divers Lands to the Defendants the Brewers Company, in Truſt to pay certain Annuities thereout to the Poor of *Iſlington*; ſince which, the Lands being improved, the Information was for an Account of this Charity.

The Brewers Company inſiſt by their Anſwer, that there is 800 *l.* due to them from the Charity; but that, however, they have not ſtopped the Payment to the Poor, and are willing the improved Rents ſhall be applied for the Benefit of the Charity.

The Court, at the Hearing, decreed an Account of the Charity, and of the Debt due from thence to the Company.

The Maſter reports but 180 *l.* due from the Charity to the Company, and reſerves Intereſt and Coſts.

Intereſt but from the Time of the Maſter's Report confirmed, where the Debt is not before liquidated.

And now the Cauſe coming on upon the Equity reſerved, the Court ordered Intereſt to the Defendants the Company for the 180 *l.* from the Time of confirming the Report, and not before; for that until then, it was no liquidated Sum.

But as to Coſts, the Defendants the Company to have none, though the Ballance was in their Favour; foraſmuch as they would have overcharged the Charity ſix hundred and twenty Pounds; and the Plaintiffs to have their Coſts; for that they had been ſerviceable to the Charity, by eaſing them of the ſix hundred and twenty Pounds Debt, which was claimed againſt them.

The Intereſt and the Plaintiffs Coſts to be paid out of the improved Rents of the Charity.

DE
Term. S. Michaelis,
1717.

Caſe 99.

Lord Chancellor Cowper.

Feme Covert poſſeſſed of Choſes in Action, dies, her Huſband Adminiſters and makes a voluntary Aſſignment, this is an Alteration of the Property. So if the Huſband had ſurvived, and then had died without altering it, or ſo much as adminiſtring to his Wife.

Squib verſus *Wyn*.

MR. *Harbord* had four Daughters, (*viz.*) the Counteſs of *Kingſton*, Lady *Aiſcough*, *Grace Hatcher*, and Lady *Wyn*, and after having given ſome Legacies, deviſed his real and perſonal Eſtate equally among his four Daughters, and died.

The Counteſs of *Kingſton* died inteſtate, and the Lord *Orford* adminiſtred to her, and Mr. *Hatcher* the Huſband of one of the Daughters, aſſigned over all that Share of the Perſonal Eſtate which came to his Wife by the Death of the Counteſs, (and which conſiſted of Choſes in Action,) unto Mr. *Richard Snow*; *Grace Hatcher* afterwards died, and Mr. *Hatcher*, having married again, died inteſtate, and his ſecond Wife having adminiſtred to him, and having alſo gained Adminiſtration in the Spiritual Court to *Grace Hatcher de Bonis non* adminiſtred by her Huſband:

The Queſtion was, who had a Right to Mrs. *Grace Hatcher*'s Share of the Counteſs of *Kingſton*'s Perſonal Eſtate?

It was inſiſted for the ſurviving Daughters of Mr. *Harbord*, that Mrs. *Hatcher*'s Share of Lady *Kingſton*'s Perſonal Eſtate, was but a Choſe in Action, and that though a Right to a third Part of it veſted in *Grace Hatcher*, yet the Husband's Aſſignment of it being only voluntary, was not to be regarded in Equity. *Secus* if the Aſſignment had been for a valuable Conſideration.

That a voluntary Aſſignment by Mr. *Hatcher* would not have bound Mrs. *Hatcher*, if ſhe had ſurvived, and by the ſame Reaſon ſhould not bind her Repreſentatives, now ſhe was dead.

Nay, That this Aſſignment to *Snow* by the Husband was worſe than voluntary, it being fraudulent, and ſaid to be ſo by his ſecond Wife who now made a Title to it; and therefore ſuch an Aſſignment, as ſhe herſelf who would take Advantage of it, called fraudulent, ought not to prevail.

Wherefore, if the Aſſignment was out of the Caſe, the Husband *Hatcher*, upon the Death of his Wife, had not (as Husband, and ſurviving his Wife) the leaſt Right veſted in him, to any of his Wife's Choſes in Action, but muſt take out Adminiſtration to his Wife, and after he ſhould have done ſo, the Letters of Adminiſtration would give him nothing, but only a Power of altering the Property, which Power if not made uſe of, it then would be as if he had never had it.

That the Statute of Diſtribution would not better the Husband's Title in this Caſe; ſince the Clauſe in the Statute of Frauds, (29 *Car.* 2. *cap.* 3. *ſect.* 25.) which ſays, that the Statute of Diſtribution ſhall not affect the Husband's Right to his Wife's perſonal Eſtate, exempts him from diſtributing, only in Caſes where he has an *Intereſt veſted in him*, which here he had not: So that it was the ſame Caſe, as if the Statute of Diſtribution had never been made; or as if this Caſe had happened before that Statute. Conſequently, after the Husband's Death without altering the Property, then the Choſes in Action of the Wife, not adminiſtred by the Husband, did fall within the Statute of Diſtribution, and became diviſible amongſt the next of Kin of *Grace* the Inteſtate, the Wife of *Hatcher*.

Neither was it material that the Defendant, the ſecond Wife of *Hatcher*, had gained Adminiſtration *de bonis non, &c.* of *Grace* the firſt Wife, for ſtill ſhe was but a Hand to receive the Money, ſubject to Diſtribution according to the Statute.

Lord Chancellor: The Husband's Title at Law to the perſonal Eſtate of the Wife is favoured; even a Term which is a Chattel real, ſhall go to the Husband (*a*) ſurviving his Wife; and as to all the perſonal Goods, they are his by the Intermarriage. Though the Husband adminiſtring to the Wife is (*b*) liable to pay her Debts, yet he is intitled to the Surplus, which will go to his Repreſentatives; and as to this Aſſignment, notwithſtanding it was voluntary, I cannot but think it did bind the Property; for there might be Time ſpent, and Delays uſed, before the Husband could recover this perſonal Eſtate in Equity; but the Delays of Suits ought not to turn to his Prejudice. And with Reſpect

(*a*) 1 Inſt. 46. b. 357. b.

(*b*) Vide in *Earl of Thomond* verſus *Earl of Suffolk*, 468.

ſpect to the Clauſe in the Statute of Frauds, the Exception does not confine it to the Life of the Huſband, or to the Circumſtance of his having reduced any Part of the Wife's Perſonal Eſtate into Poſſeſſion, but provides, that no Part of her Eſtate ſhall be diſtributable amongſt her Relations after her Death.

So that it ſeems reaſonable the Aſſignment ſhould be taken to alter the Property; beſides, that it is the very Ground of the Difference, that Choſes in Action are aſſignable in Equity, though not at Law; and this Matter ſeems to have been decided by the Spiritual Court in Favour of the Huſband and his Repreſentatives, by that Court's granting Adminiſtration *de bonis non* of *Grace Hatcher* to the next of Kin of the Huſband: Wherefore

Decree the Benefit of *Grace Hatcher*'s Share of her deceaſed Siſter's Perſonal Eſtate to the Adminiſtratrix of *Hatcher* the Huſband.

See the Caſe of *Cart* and *Rees* in *Michaelmas* (*a*) Term 1718. where this ſtronger Caſe happened, (*viz.*) A Wife died poſſeſſed of Choſes in Action, and the Huſband ſurvived, and died without taking out Letters of Adminiſtration to his Wife, after which, the next of Kin of the Wife adminiſtred to her, and Lord *Parker* held, that the Adminiſtrator to the Wife was but a Truſtee for the Executor of the Huſband, the Right to the Wife's Choſes in Action being, by the Statute of Diſtribution, veſted in the Huſband, as next of Kin to the Wife; and whereas there is a Proviſo in 29 *Car.* 2. ſaying, that the Statute of Diſtribution ſhall not extend to the Eſtates of Feme Coverts that die inteſtate, but that their Huſbands may have Adminiſtration of their Perſonal Eſtate, as before the making the Act.

(*a*) Jovis 27 Nov.

His Lordſhip ſaid, this Clauſe was made in Favour of the Huſband, and not to his Prejudice; ſo that it was intended by the Parliament, that the Huſband ſhould be within the Statute of Diſtribution, ſo as to take the Wife's Choſes in Action, as to his Benefit, but ſhould not be within the ſame, as to his Prejudice; and that this was not a new Point, but had been ſettled, and upon very good Reaſon; for were the Conſtruction to be otherwiſe, the Huſband of the Wife inteſtate, would be in a worſe Caſe than the next of Kin, though ever ſo remote, which was not the Intent of the Statute.

And there Mr. *Vernon* cited this Caſe of Lady *Aiſcough*, wherein he ſaid Lord *Cowper*'s Opinion was the ſame with Lord *Parker*'s, (*viz.*) that the Wife's Choſes in Action did veſt in the Huſband by the Statute of Diſtribution; ſo that ſince this Reſolution, the Right of Adminiſtration (*a*) follows the Right to the Eſtate, and ought, in Caſe of the Huſband's Death after the Wife, to be granted to the next of Kin to the Huſband, in the ſame Manner, as it is granted to a reſiduary Legatee.

(*a*) Includes.

Caſe 100. *Lord Chancellor* Cowper. Abr. of Caſes in Eq. 54. See more relating to this Caſe in the Caſe of *Richmond* verſus *Tayleur*, poſt 734. Huſband before he hath received the Wife's Fortune becomes a Bankrupt, the Aſſignees ſhall not receive it, without making ſome Proviſion for the Wife.

Jacobſon & al' verſus *Williams.*

WALTER *Wallinger* by his Will left to his Niece *Elizabeth Tayleur* an Infant, 1000 *l.* payable after the Death of the Teſtator's Wife, and at his ſaid Niece's Age of twenty Years, if ſhe ſhould live ſo long.

The Niece married *J. S.* without the Knowledge or Conſent of her Father, *J. S.* being at that Time much in Debt by Judgment, and otherwiſe, and having gained the young Gentlewoman's Conſent by bribing her Maid-Servant; the Niece was about eighteen Years of Age.

Soon after the Marriage, *J. S.* became a Bankrupt, and the Commiſſioners of Bankruptcy aſſigned over all the Eſtate and Effects of the Bankrupt to the Plaintiffs, in Truſt for the Creditors, who brought their Bill for this Legacy, the Teſtator's Widow being dead, and the Niece being above twenty Years old, and conſequently the Legacy due; and the Bankrupt had two Children by his Wife then living.

This Cauſe coming on before Baron *Price,* in the Abſence of the Lord Chancellor, the Baron, in regard to Creditors, did decree the Legacy and Intereſt to be paid to the Plaintiffs.

But upon an Appeal from that Decree to the Lord Chancellor, his Lordſhip declared, that foraſmuch as the Plaintiffs the Aſſignees in the Commiſſion claimed under the Bankrupt, they ought not to be in a better (*a*) Caſe than the Bankrupt himſelf; and ſince, if he had brought a Bill for this Legacy, the Court would not have allowed it him, without obliging him, at the ſame Time, to make ſome Proviſion for the Wife and Children; ſo for the ſame Reaſon, when theſe claiming under the Bankrupt, and who muſt be exactly in the ſame Caſe as he himſelf would have been in, came for Equity, they ought to do Equity, which would be to provide for the Wife and Children of the Bankrupt, from whom they derived their Claim.

But with regard to the Intereſt of the Money, as the Bankrupt commonly was allowed to receive that, ſo the Aſſignees ought to receive the ſame during the Bankrupt's

(*a*) Poſt *Boſevil* verſus *Brander,* 459.

rupt's Life. Alſo, if the Bankrupt's Wife ſhould die without Iſſue, then the Bankrupt would have been allowed to receive the whole Money; and therefore, in ſuch Caſe, the Aſſignees ſhould be allowed to receive it alſo.

As to the Objection, that the Aſſignment was made by the Commiſſioners before any Right to the Legacy veſted in the Wife, (*viz.*) before ſhe was twenty, ſo that at that Time the Legacy was not veſted, and, by Poſſibility, might never veſt, foraſmuch as ſhe might have died before twenty;

Lord Chancellor ſaid, that was not to be ſo much regarded; becauſe the Commiſſioners might ſupply it by making a new Aſſignment, tho' (it was true) ſuch new Aſſignment would not help this Bill, ſo as to intitle the Plaintiffs to any Decree thereon.

That he took it for granted, there were no Precedents in this Caſe, there being none cited on either Side, and therefore the Court was at Liberty to judge upon the Reaſon of the Thing; but however, a judge having given a contrary Opinion, he would take Time to conſider of it.

(*a*) 2 Vern. 564. See this Caſe alſo cited ante, *Finch* verſus *Earl of Winchelſea*, 280.

And on the Cauſe's coming on again, Mr. *Vernon*, for the Defendant, cited the Caſe of *Taylor* and (*a*) *Wheeler*, where *A.* mortgaged a Copyhold for a conſiderable Sum of Money, but the Conveyance was defective for want of a Surrender being preſented in Time, after which *A.* became a Bankrupt, and the Court helped the Mortgagee of the Copyhold againſt the Aſſignees under the Commiſſion, which he urged to be an Argument, that the Creditors or Aſſignees of the Commiſſioners are not to be regarded as Purchaſers.

It was moreover obſerved to the Court, that the Bankrupt had, in this Caſe, gained his Certificate, and was diſcharged, and that the Aſſignment made to the Complainants being before the Legacy was veſted, if they could not now ſupply the Aſſignment by making a new one, the Conſequence was, that the Legacy was become veſted in the Bankrupt.

But the Lord Chancellor replied, that this not appearing in the Pleadings, he could take no Notice of it.

Poſſibility of Right belonging to a Bankrupt not aſſignable.

Nevertheleſs, at another Day, the Fact being made to appear by a Petition, with the Certificate of the Commiſſioners, and the Allowance of the Lord Chancellor *Harcourt* annexed, the Court ſaid, it was clear, the Commiſſioners could not aſſign this Poſſibility of Right which the Bankrupt had to the Portion, and conſequently the Aſſignees being Plaintiffs in the Bill, and intitling themſelves under this Aſſignment, and this Aſſignment being void, with Reſpect to ſuch (*) Poſſi-

---

(*) But the Reaſon given above, *viz.* becauſe the Bankrupt the Huſband could not have come at his Wife's Portion without the Aſſiſtance of a Court of Equity, which would not have decreed it to him, but on his making ſome Proviſion for his Wife, ſeems to have been the beſt Foundation for this Decree; ſince a Poſſibility or contingent Intereſt is certainly aſſignable by the Commiſſioners. Thus in the Caſe of *Higden* verſus *Williamſon*, firſt heard at the Rolls *Mich.* 1731. and afterwards Affirmed by Lord Chancellor *King* in *Mich.* 1732. the Caſe in Effect was, An Eſtate was deviſed to be ſold, and the Monies ariſing from ſuch Sale to be divided amongſt ſuch of the Children of *A.* as ſhould be living at *A.*'s Death; *A.* had ſeveral Children, one of whom, *viz.* *B.* became a Bankrupt, and the Commiſſioners aſſigned over his Eſtate, after which *B.* got his Certificate allowed, and then *A.* died. Decreed that this Share of the Money, which on *A.*'s Death belonged to *B.* ſhould be paid to the Commiſſioners; for that not only the latter Statutes relating to Bankrupts, mention the Word [Poſſibility]; but alſo, becauſe the 13 *Eliz.* *cap.* 7. *ſect.* 2. impowers the Commiſſioners to aſſign all that the Bankrupt *might depart with*, and here *B.* in the Life-time of *A.* might have releaſed this contingent Intereſt. Beſides, the 21 *Jac.* 1. *cap.* 19. enacts, that the Statutes relating to Bankrupts ſhall be conſtrued in the moſt beneficial Manner for Creditors.

bility, therefore the Bill muſt be diſmiſſed, but without Coſts, becauſe the Plaintiffs were Creditors.

Commiſſioners of Bankruptcy having made an Aſſignment of the Bankrupt's Eſtate, and afterwards given the Bankrupt his Certificate and Diſcharge, cannot make a ſubſequent Aſſignment.

Afterwards in *Trin. Term* 1718. the Wife of *J. S.* by her next Friend, having brought a Bill ſetting forth her being ſeduced into this Marriage, and the Huſband's Bankruptcy, together with the Certificate for his Diſcharge, prayed, that the Money might be put out for her ſeparate Uſe for her Life, and afterwards for her Children; to which the Huſband putting in his Anſwer, and declaring himſelf ſenſible of his having injured his Wife, in Manner as above, ſubmitted to what was deſired by the Bill, only he prayed the Arrears of Intereſt.

On the other Hand, the Aſſignees oppoſed the Bill, inſiſting, that the Commiſſioners might ſtill make a new Aſſignment of this, which was now, and not before, veſted.

But by Lord Chancellor *Parker*: The Commiſſioners have executed their Power, and the Debts, which the Huſband the Bankrupt owed to the Creditors before the Bankruptcy, are now extinct by Act of Parliament, and this Portion is as a new acquired Eſtate by the Huſband, in Right of his Wife.

Wherefore, ſince the Huſband agrees to this Prayer of the Wife's Bill, (which is but a reaſonable Reparation for the Wrong he has done her,)

Decree the Huſband the Arrears of Intereſt, deducting the Coſts, and let the Legacy be laid out in a Purchaſe; and in the mean Time, let the Wife have the Intereſt for her ſeparate Uſe, *&c.* By which Means the whole Legacy was ſaved to the Wife and to her ſeparate Uſe.

Elſe verſus *Osborn*.

Caſe 101.

Lord Chancellor Cowper.

2 Vern. 754.

A. Makes a Settlement to the Uſe of himſelf for ninety-nine Years (if he ſo long live), Remainder to Truſtees and their Heirs during his Life, *&c.* Remainder to the Uſe of the Heirs of his Body, Remainder to himſelf in Fee; *A.* has two Sons, and *A.* and the Truſtees, and the eldeſt Son when of Age, join in a Feoffment and Fine to *B.* in Fee, as a Security for ſo much Money; the eldeſt Son dies without Iſſue, and the ſecond Son brings a Bill to ſet aſide this Mortgage.

A. ſettles to the Uſe of himſelf for ninety-nine Years, if he ſhould ſo long live, Remainder to Truſtees during his Life, *&c.* Remainder to the Heirs of his Body, Remainder to *A.* in Fee; *A.* has two Sons, and *A.* and the Truſtees and the eldeſt Son join in a Mortgage by Feoffment, and the eldeſt dies without Iſſue; the ſecond Son, during the Life of the Father, has no Pretence to ſet aſide the Mortgage; tho' this ſeems a Breach of Truſt in the Truſtees.

Lord Chancellor: This is plainly a contingent Remainder, being limited to the Heirs of the Body of *A.* who can have no Heir during his Life; for *Nemo eſt hæres viventis*; and it is as plain, that this Feoffment does at Law deſtroy the contingent Remainder, in regard the Truſtees, who had the Freehold, joined. But it may be here a Queſtion, whether this be a Breach of Truſt in the Truſtees?

It is true, if the eldeſt Son joins in a Feoffment, where the Remainder in Tail is limited to the *eldeſt Son*, it prevents any Breach of Truſt in the Truſtees; but here the Limitation being to the *Heirs of the Body* of *A.* who cannot have an Heir of his Body during his own Life, therefore the joining of the eldeſt Son is not, in this Caſe, ſo material.

And yet it ſeems hard, when the Heir apparent joins, in a Caſe where it would be no Breach of Truſt if the Limitation were to the eldeſt Son, that it ſhould be a Breach of Truſt, in reſpect of the Limitation to the Heir.

However, the Meaning of the Limitation, in the principal Caſe, is, to carry the Settlement as far as may be, and beyond the Limitation to the firſt Son, and the Truſtees appointed to preſerve the contingent Remainders, ought not to join in deſtroying theſe Remainders, which is acting the (*a*) Reverſe of their Truſt.

(*a*) Vide ante the Caſes of *Pye* verſus *Gorge*, 129. *Baſſet* verſus *Clapham*, 358. & poſt *Manſell* verſus *Manſell*, 2 Vol. 610.

But after all, as to the preſent Bill, it is clear, the ſecond Son, tho' he has ſurvived the eldeſt, yet has no Right to bring it in the Father's Life-time; for he neither is, nor poſſibly ever will be, the Heir of his Father, unleſs he ſurvives his Father, which is uncertain.

Caſe 102.

Lord Chancellor Cowper.

Plume verſus *Beale*.

Executor proves a Will of a perſonal Eſtate, wherein one of the Legacies is forged, the Executor has no Remedy in Equity, but ought to have proved the Will, with a ſpecial Reſervation as to that Legacy.

A Bill was brought by the Executor of Doctor *Plume*, to be relieved againſt a Legacy of 100 *l.* claimed by the Defendant *Beale*, as given by the Will of Doctor *Plume*.

The Defendant *Beale* was no Relation to the Doctor nor had done him any Service, ſaving that now and then ſhe had, during his Illneſs, brought him ſome few ſlight Cordials, in Return for which, the Doctor had ordered her a Piece of Plate.

This 100 *l.* Legacy was interlined in the Will by a different Hand, and ſuppoſed to have been done by the Defendant herſelf, when ſhe was left in the Room alone with the Corps, in which Room the Will was left.

But foraſmuch as the Will was proved by the Plaintiff the Executor in a proper Court, that had a proper (*a*) Juriſdiction, (it relating only to a perſonal Eſtate,) and more eſpecially, for that the Executor might have proved the Will in the Spiritual Court, with a particular Reſervation as to this Legacy, the Court ſaid, his Remedy muſt be there, and diſmiſſed the Bill with Coſts.

(*a*) 2 Vern. 8, 77. Ante 12, *Twaits* verſus *Smith*, & 2 Vol. 287. *Stephenton* verſus *Gardiner*.

Seeley verſus *Jago*.

Caſe 103.
Lord Chancellor Cowper.

One deviſes 1000 *l.* to be laid out in a Purchaſe of Lands in Fee for the Benefit of *A. B.* and *C.* and their Heirs, equally to be divided; *A.* dies leaving an Infant Heir; *B.* and *C.* may have their Share paid them in Money, but the Infant cannot.

ONE deviſed that 1000 *l.* ſhould be laid out in a Purchaſe of Lands in Fee, to be ſettled upon *A. B.* and *C.* and their Heirs, *equally to be divided*; *A.* dies leaving an Infant Heir; and *B.* and *C.* together with the Infant Heir, bring a Bill for this 1000 *l.*

Lord Chancellor: The Money being directed to be laid out in Lands for *A. B.* and *C. equally*, (which makes them Tenants in Common,) and *B.* and *C.* electing to have their two Thirds in Money, let it be paid to them; for it is in vain to lay out this Money in Land for *B.* and *C.* when the next Moment they may turn it into Money, and Equity, like Nature, will do nothing in (*a*) vain.

(*a*) Ante *Benſon* verſus *Benſon*, 131. poſt *Short* verſus *Wood*, 471.

But as to the Share of the Infant, that muſt be brought before the Maſter, and put out for the Benefit of the Infant, who, by reaſon of his Infancy, is incapable of making an Election. Beſides, that ſuch Election might, were he to die during his Infancy, be prejudicial to his Heir.

DE
Term. S. Hillarii,
1717.

Caſe 104.
Lord Chancellor Cowper.

One deviſes Lands to his Executors, (who are no Relations,) to ſell for the beſt Price, and to pay his Debts, Legacies and Funerals, ſo far as the ſame will extend, and gives Legacies to his Heirs at Law, and 100 *l.* to the Children of one of his Executors, but nothing to his Executors; in ſuch Caſe the Executors ſhall be but Truſtees for the Heirs at Law, after Debts paid.

Starkey verſus *Brooks.*

PHILIP *Starkey*, being ſeiſed in Fee, deviſes his Lands to two Gentlemen of his Acquaintance, (but who were not of Kin to him,) and their Heirs, in Truſt to be ſold by them, or the Survivor of them, for the beſt Price, and with the Money to pay his Debts, Legacies and Funerals, ſo far as the ſame will extend, and, among other Legacies, he gives 40 *l.* to *Jane Stiles*, and 10 *l.* to *Elizabeth Stiles*, (who were his Couſins and Coheirs,) and makes the two Deviſees Executors, giving 100 *l.* to the Children of one of them.

The Surplus of the Money ariſing by the Sale being 500 *l.* the Queſtion was, whether it ſhould go to the Truſtees who were alſo Executors, or to the Heirs at Law, who, in this Caſe, brought a Bill againſt the Executors, for an Account of the Surplus.

On Behalf of the Deviſees the Executors, it was objected, that here were expreſs Legacies given to the

Coheirs, which implied, that they ſhould have no more, and the Caſe of *Crompton* verſus *North*, *Chan. Rep.* 196. was ſaid to be in Point; alſo, in this Caſe, as there were Legacies given to the Heirs at Law, ſo on the other Hand nothing was left to the Executors.

Lord Chancellor: In Caſes of this Nature, the Circumſtances muſt govern:

Now the chief Objection is, that here are expreſs Legacies given to the Heirs at Law, and none to the Executors; but the Will being, that the Executors ſhould ſell the Eſtate for the beſt Price that they could get for the ſame, this Clauſe need not to have been put in, if the Deviſees were intended to be Owners.

Beſides, ſuppoſing the perſonal Eſtate had been ſufficient to have paid the Debts, and that there had been no need of any Sale, ſurely the Deviſees ſhould not, in ſuch Caſe, have gone away with the Eſtate from the Heir at Law.

It is material alſo, that the Truſtees are to apply the Money ariſing by the Sale in Payments of Debts, Legacies and Funerals, by which is implied the whole Money, and that ſhews it was not deſigned to be a beneficial Truſt.

Again, deviſing the Eſtate, and Power of Sale to the Survivor, is a farther Argument of its being rather a Truſt than an Ownerſhip, and that the Truſt was intended to follow the Eſtate.

Wherefore let the Deviſees account for the Surplus to the Heirs at Law.

Caſe 105.
Lord Chancellor Cowper.

Jenner verſus *Morgan*.

Tenant for Life leaſes for Years, rendering Rent half-yearly, and dies in the Middle of the Half-year, Equity will not apportion the Rent, as to Time.

THE Father being Tenant for Life, Remainder in Tail to the Son the Plaintiff, the Father was indebted by ſeveral Judgments, and his Land extended by *J. S.* a Judgment Creditor, who leaſed the ſame to the Defendant, rendering 160*l. per Annum* payable quarterly.

March 6. 1710. the Father the Tenant for Life died, and the Defendant the Tenant continuing in Poſſeſſion until after the *Lady-day* following;

It was inſiſted for the Plaintiff, that the *Lady-day*'s Rent (being 40*l.*) ought to be paid to the Plaintiff by the Defendant the Tenant, for that the Defendant, by his holding over, ſhewed his Election to continue Tenant at Will to the Plaintiff the Son; and that this could be no Hardſhip on the Tenant, ſince in all Events he ought to pay his Rent to (*a*) ſome Perſon, and *J. S.* the Judgment Creditor could have no Pretence to the *Lady-day*'s Rent; and tho', in this Caſe, the Tenant for Life died 6 *March*, the Reaſon had been the ſame, if he had died the Day after *Chriſtmas-day*.

(*a*) Vide ante *Lord Strafford* verſus *Lady Wentworth*, cited 180.

Lord Chancellor: There are ſeveral remedial Statutes relating to Rents, but this is *Caſus omiſſus*; the Law does not apportion Rent, in Point of (*b*) Time, and I do not know that (*c*) Equity ever did it; this is an Accident which the Judgment Creditor might have guarded

(*b*) 1 Inſt. 292. b. 10 Rep. 128.

(*c*) But Equity will apportion Intereſt on a Mortgage; vide 2 Vol. *Edwards* verſus *Counteſs of Warwick*, 176. alſo Maintenance-Money, poſt *Hay* verſus *Palmer*, 2 Vol. 502. Vide alſo the 11th of his preſent Majeſty, by which Rent is apportioned in Point of Time.

againſt, by reſerving the Rent weekly; ſo that it is his Fault, and becomes a Gift in Law to the Tenant.

Whereupon the Court held, that as to the Profits from the End of the laſt Quarter, to the Death of the Tenant for Life, the Tenant ſhould pay nothing; but for the Profits, from the Death of the Tenant for Life, the Tenant the under-Leſſee was to account to the Plaintiff; and with regard to the Notion, that the Tenant's remaining in Poſſeſſion, ſhewed his Election to continue at the old Rent; this, the Court ſaid, only ſhewed his Election from that Time, and not from the End of the preceding Quarter-Day.

Mocatta & al' verſus *Murgatroyd.*

Caſe 106.
Lord Chancellor Cowper.

AN Owner of a Ship mortgages his Ship to *A.* with whom he leaves the original Bill of Sale, and this Mortgage to *A.* is made by a Deed of Mortgage only, without any Indorſement, or Notice of the Mortgage on the Bill of Sale, as is uſual.

Afterwards the Mortgagor deſired *A.* the Mortgagee, to let him have the original Bill of Sale, which was complied with, and thereupon the Mortgagor made ſeveral ſubſequent Mortgages of ſeveral Parts of the Ship, which were indorſed upon the original Bill of Sale, and ſometime afterwards the Mortgagor delivered up the Bill of Sale to *A.* the Mortgagee, who made no Objection, or Complaint of theſe Indorſements; it appeared likewiſe in the Caſe, that the Owner of the Ship had made a prior Mortgage to this of *A.*'s, by a Deed bearing Date the Day before, but that the prior Mortgagee was a Witneſs to the Mortgage-Deed made to *A.* alſo *A.* the Mortgagee ſometime afterwards took a Releaſe, from the Mortgagor, of his Equity of Redemption.

In which Caſe theſe Points were decreed by the Lord Chancellor:

Where a firſt Mortgagee is a Witneſs to the ſecond Mortgage, tho' no actual Proof of his knowing the Contents thereof, yet ſince the Preſumption is, that he might have known the ſame, this ſhall poſtpone him.

1*ſt*, That the firſt Mortgagee of the Ship being a Witneſs to the ſecond Mortgage, tho' it did not appear, that he actually knew the Contents of the ſecond Mortgage, yet ſince it did not appear, but that he might know them, it would be preſumed, that every Witneſs that could write or read, was acquainted with the Subſtance of the Deed or Inſtrument, which he, having atteſted it, undertook to ſupport by his Evidence; and that therefore, in the principal Caſe, the firſt Mortgagee being a Witneſs to the ſecond Mortgage, and not acquainting the ſecond Mortgagee with his former Mortgage, this ſhould give a (*a*) Preference to ſecond Mortgage.

Mortgagee of a Ship by Deed intruſts the Mortgagor with the original Bill of Sale, and the Mortgagor indorſes thereon ſubſequent Mortgages or Bills of Sale of ſeveral Parts of the Ship, and Mortgagee acquieſces; this is Evidence of an Aſſent in ſuch Mortgagee, and ſhall therefore poſtpone him.

2*dly*, That when *A.* the Mortgagee was ſo careleſs, as to intruſt the Mortgagor with the original Bill of Sale, by which Means Indorſements of the ſubſequent Mortgages were made thereon, and accepted again of the Bill of Sale from the Mortgagor, without making any Complaint, or taking any Exception thereto; this, together with the long Acquieſcence afterwards, amounted to an implied Conſent in *A.* to the ſubſequent Mortgages of the ſeveral Parts of the Ship that had been indorſed, and ſhould give a Preference to ſuch Mortgages.

(*a*) *Qu. autem*, Whether the bare atteſting a ſubſequent Incumbrance, without other Circumſtances of preſumptive Notice, will poſtpone a prior Incumbrancer, ſince at that Rate, a prior Mortgagee or Incumbrancer may, without any Fraud or ill Intention on his Side, be liable to be cheated of his Security; and ſo I find it ſaid by Lord *King* in our Author's Report of an *Anonymus* Caſe, in *Mich.* 1732.

3*dly*, That tho' *A.* the Mortgagee, when there were ſubſequent Mortgages, took afterwards a Releaſe of the ultimate Equity of Redemption, yet this did not oblige the ſaid *A.* who had taken a Releaſe of ſuch Equity, to pay the intermediate Mortgages, provided he would ſtill waive the Releaſe made to him of the Equity.

The firſt Mortgagee takes a Releaſe of the ultimate Equity of Redemption, this does not oblige the ſaid firſt Mortgagee to pay off the intermediate Mortgages, if he will waive the Releaſe.

4*thly*, In this Caſe *A.* the Mortgagee was ordered to pay Coſts to the Plaintiffs, who were Indorſees of the ſubſequent Mortgages or Bills of Sale; but *A.* was not to have his Coſts over, againſt the firſt Mortgagor; in regard, Lord Chancellor ſaid, it was not reaſonable that *A.* ſhould onerate his Pledge with Coſts occaſioned by his unjuſt Defence.

Mortgagee ſhall not onerate his Pledge with Coſts which he occaſions by an unjuſt Defence.

Ekins verſus *Eaſt-India Company.*

Caſe 107.

Lord Chancellor Cowper.

THE Plaintiff *Ekins* was poſſeſſed of a Ship, and the Agent of the *Eaſt-India* Company in the *Eaſt-Indies* bought the Ship, and the Cargo in her, of the Commander, who had no Power to ſell her; and there was ſome Proof of the Treachery of the Commander, and of ſome indirect Practices by the Agent; but this ſeemed to have been done without the Privity of the Company, tho' for their Uſe and Benefit.

Intereſt allowed for a Ship and Cargo wrongfully taken by the Defendant; and this being done in the *Indies*, *Indian* Intereſt allowed, deducting the Charge of the Return.

Ekins brings his Bill to have an Account of the Ship and Cargo from the Company, who were decreed to account for the ſame; and an Iſſue was directed to try the Value of the Ship and Cargo, at the Time theſe came to the Hands of the Company's Agent; upon which the Jury found the Value of the Ship to be 3000 *l.* and that of the Cargo to amount to about 600 *l.*

And now, upon the Equity reſerved, it was inſiſted, that the Plaintiff ought to have Intereſt, and that the Intereſt ought to be *Indian* Intereſt, which was about 12 *per Cent.* Againſt which it was

Objected, 1*ſt*, That the Value of the Ship and Cargo being uncertain, it could not, in the Nature of it, carry Intereſt, but from the Time it was aſcertained by the Jury.

2*dly*, That the Plaintiff had, at this Time, reſted thirteen Years upon his own Bill, and therefore to allow him *Indian* Intereſt, would be to make him a Gainer by his own Delay.

Cur. If a Man has my Money by way of Loan, he ought to anſwer Intereſt; but if he detains my Money from me wrongfully, he ought *a fortiori* to anſwer Intereſt. And it is ſtill ſtronger, where one by wrong takes from me either my Money, or my Goods which I am trading with, in order to turn them into Money.

Therefore let the Defendants pay Intereſt; and this being tranſacted in the *Indies*, where the Perſon who acted by Authority under them, and for their Uſe, muſt be preſumed to have made the common Advantage that Money yields there, the Company muſt anſwer the Intereſt of that Country; but in Conſideration this Money is now to be paid *here*, the Charge of returning it from the *Indies* ought to be deducted.

Let the Maſter ſee what was the Intereſt of Money during theſe Years in the *Indies*, and what is the Charge of returning Money from the *Indies* to *Eng-*

land, and he is to allow *Indian* Intereſt, deducting out of it the Charge of returning.

Goodright verſus *Wright*.

Caſe 108.

Devise to *A.* and his Iſſue, Remainder to *B.* and his Iſſue, Remainder to the Heirs of *A.* *A.* dies without Iſſue in the Life of the Teſtator; *B.* dies in the Life of the Teſtator, leaving Iſſue who is alſo the Heir of *A.* The Iſſue ſhall not take an Eſtate-Tail as Iſſue of *B.* nor the Remainder in Fee as Heir of *A.*

SPecial Verdict in Ejectment upon this Caſe: One ſeiſed in Fee deviſed the Lands to *A.* and his Iſſue, Remainder to *B.* and his Iſſue, Remainder to the Heirs of *A.* *A.* died without Iſſue, in the Life of the Teſtator, and *B.* died in the Life of the Teſtator, leaving Iſſue the Defendant, who was alſo the Heir of *A.* and the Plaintiff in Ejectment was the Heir of the Teſtator.

The Queſtion was, whether, in regard the Deviſees, *A.* and *B.* died in the Life of the Teſtator, the Iſſue of *B.* (who was born after the making of the Will, and ſo could not take jointly with the Deviſees,) could take, either as Heir of the Body of *B.* or as right Heir of *A?*

And the Opinion of the whole Court was thus delivered by C. J. *Parker*.

This Caſe is exactly within the Reaſon of *Bret* and *Rigden*'s Caſe. *Plowd.* 340.

1*ſt*, Becauſe, as well in this Caſe, the Word [Iſſue] as in that, the Word [Heirs] is clearly uſed as a Word of Limitation, *viz.* to meaſure out the Quantity of Eſtate that the Deviſee is to take, and not as a Word of Purchaſe, the Deviſee only being in the View and Conſideration of the Teſtator, and the Words, [Heir, or Iſſue,] mentioned for nothing elſe, but to limit

what

what Eſtate the Deviſee ſhould take, and there is no Diverſity betwixt a Deviſee in Fee, and a Deviſee in Tail; the Statute of *Weſtminſter* the Second makes none; for that only provides for the Iſſue, in Caſe where an Eſtate-Tail is actually created and veſted, but makes no Diverſity at all in the Rules of Law concerning the Creation of Eſtates-Tail, which are exactly the ſame, as to the Intent of the Deviſor, or as to the veſting the Eſtate, as thoſe relating to Eſtates in Fee-Simple; the Statute *de Donis* was made for the Benefit of the Iſſue in Tail, which ſuppoſes an Eſtate in Tail in the Anceſtor (which is the Queſtion here); and the Statute *de Donis* is called the *Nurſe*, and not the *Mother* of Eſtates-Tail.

2*dly*, Becauſe the Heir in Tail is abſolutely in the Power of the Anceſtor, to be barred by him (ſince the Statute of 4 *H.* 7. of Fines, and the Conſtruction of Law, which eſtabliſhes common Recoveries,) as much as the Heir in Fee-Simple is in the Power of his Anceſtor; and therefore, as well in Caſe of an Eſtate Tail, as of a Fee-Simple, the Deviſor cannot be intended to have had any Conſideration for, or regard to, the Heir, ſince in both Caſes the Deviſor gives the Deviſee ſuch an Eſtate, as enables him abſolutely to bar his Heir.

3*dly*, Another Reaſon why the Heir cannot take, when the Deviſee dies in the Life of the Deviſor, is, becauſe he cannot take by Deſcent, for that nothing was ever in the Anceſtor; and if he ſhould take as a Purchaſor, then the Eſtate would be deſcendible contrary to the Intent of the Deviſor; for if the Anceſtor had taken the Eſtate, and it had deſcended to the Heir, the Rules of Deſcent had been quite different (*a*) from what they would have been, if the Heir had taken as a Purchaſor. Then, as to the Remainder in

(*a*) Vide *Littleton*, *ſect.* 4.

Fee limited to the Heirs of *A.* it is alſo the Opinion of the Court, that the Heir General cannot take it; for the Interpoſition of the Eſtate-Tail to *B.* betwixt the Eſtate-Tail limited to *A.* and the Remainder in Fee limited to his right Heirs, makes no Difference; becauſe, notwithſtanding the mean Remainder, the Word [Heirs] is a Word of Limitation of Eſtate, and the Fee-Simple veſts in the Anceſtor. 1 *Inſt.* 22. *b.* 319. *b.* And if *A.* had ſurvived the Teſtator, the Remainder in Fee would have veſted in him; and therefore it is within the Reaſon of *Bret* and *Rigden*'s Caſe; and the Rule laid down in 1 *Co. Shelley*'s Caſe, (*viz.*) whether the Limitation to the right Heirs be mediate, or immediate; yet where the Anceſtor has before an Eſtate for Life, the Heirs ſhall take by Deſcent (*a*) and not by Purchaſe.

(*a*) Ante 371. in *Hayter* ver. *Rod.*

And thus has the Law been * long clearly ſettled as to this Point, even ever ſince *Bret* and *Rigden*'s Caſe. But on this Occaſion I have been the larger in delivering the Judgment of the Court, becauſe of ſome (*b*) late Endeavours to invalidate this Rule, which, by the way, may make it proper to obſerve, that the *altering ſettled* (*c*) *Rules concerning Property, is the moſt dangerous way of removing Land-Marks.*

* Vide *Moor* 353. *Cro. Eliz.* 422.

(*b*) Vide Lord *Lanſdowne*'s Caſe in *B. R. Mich.* 1712. and that of *Hutton* verſus *Sympſon* & *ux.* 2 Vern. 722. Preced. in Chan. 439.

(*c*) Vide poſt 2 Vol. *Dawes* verſus *Ferrers*, 2. and *Wagſtaff* verſus *Wagſtaff*, 259.

Deviſe to *A.* for Life, Remainder to *B.* for Life, Remainder to the right Heirs of *A.* and *A.* dies in the Teſtator's Life-Time; his right Heirs ſhall never take.

But then, with Reſpect to this Remainder in Fee, limited to the Heirs of *A.* it has been urged, that though the Rule of Law be certain, that whenever an Anceſtor takes an Eſtate for Life, and afterwards a Limitation is to his Heirs, in ſuch Caſe his Heirs cannot be Purchaſers; yet in this Caſe, *A.* dying in the Life-Time of the Teſtator, *A.* himſelf never took, but the Deviſe to him was void, and therefore his right Heir may take by Purchaſe, like the Caſe, where a Feoffment is made to the Uſe of *A.* for Life, Remainder to *B.* in Tail, Remainder to the right Heirs of *A.* and *A.* is dead at the Time of the Feoffment, the right Heirs of *A.* ſhall, notwithſtanding, take the Remainder in Fee; and *Co. Litt.* (*Sect.* 578.) was cited to prove, that a particular Eſtate, and a Remainder may continue diſtinct in the ſame Perſon.

But to this the Anſwer is, that the Conſtruction of the Will muſt be according to the Import and Meaning of the Words at the Time of making of the Will, which in the preſent Caſe, was plainly to deviſe a Fee-Simple to the Anceſtor, and it would be wrong to interpret it according to any Accident *ex poſt facto*, as here, the dying of the Deviſee in the Life-Time of the Deviſor; and as to the Caſe put of the Feoffment, it ſeems, that the Remainder in Fee would be void, becauſe there was no ſuch Perſon as *A. in rerum naturâ*, and it is all one, as if the Limitation had been to *A.* and his Heirs, and there had been no ſuch Perſon as *A.* in *Eſſe.*

So here, the Deviſe to *A.* and then (by way of Remainder after a mediate Eſtate) to the Heirs of *A.* ſeems all one as if it had been to *A.* and his Heirs, by one Limitation, and that *A.* had been then dead.

Judgment for Plaintiff againſt the Will.

Wingrave verſus *Sir Richard Palgrave*.

Caſe 109.

Lord Chancellor Cowper.

Term raiſed to ſecure Daughters Portions. Truſt thereof declared, that if the Huſband ſhould leave no Heir Male by the Marriage, and ſhould leave a Daughter or Daughters, then the Truſtees to raiſe Portions payable to Daughters at twenty-one or Marriage; Proviſo, that if the Huſband ſhould die without leaving a Daughter living at his Death, then the Term to ceaſe. There is no Iſſue Male by the Marriage; but there is a Daughter who attains twenty-one and marries. Mother dies, and Daughter dies in Father's Life-Time leaving Iſſue; her Husband adminiſters to her, he ſhall have no Portion.

SIR *John Palgrave*, upon the Marriage of his Son *Auguſtine* (afterwards Sir *Auguſtine*) *Palgrave*, with *Barbara Gaſcoin*, ſettled divers Manors and Lands on *Auguſtine Palgrave* for Life, Remainder to his firſt and every other Son by *Barbara*, in Tail Male ſucceſſively, Remainder to Truſtees for ninety-nine Years, Remainder to Sir *John Palgrave* in Fee.

The Truſt of the Term of ninety-nine Years is declared to be, that if *Auguſtine Palgrave* ſhall die without Heir Male of his Body by *Barbara*, and *leaving a Daughter, or Daughters*; that then ſuch Daughter or Daughters ſhall have 3000 *l.* if but one, if more, 3000 *l.* amongſt them, payable at their Ages of twenty-one or Marriage, with a Proviſo, that if *Auguſtine Palgrave* ſhall not have any Daughter by *Barbara*, *living at his Death*, then the ninety-nine Years Term to ceaſe.

Auguſtine Palgrave had Iſſue by this Marriage, one Daughter, (*viz.*) *Elizabeth*, who, having attained upwards of the Age of twenty-one Years, married the Plaintiff.

Barbara the Mother died without Iſſue Male, or any other Iſſue but this Daughter *Elizabeth*, who has Iſſue by the Plaintiff, and *dies in her Father Au-*

guſtine Palgrave's *Life-time*; and afterwards *Auguſtine Palgrave* dies; and the Plaintiff the Husband, having adminiſtred to his Wife *Elizabeth*, brings a Bill for this Portion.

Lord Chancellor: The Plaintiff is not intitled to his Wife's Portion; for by the firſt Words, the Truſt of the Term never riſes, that being to commence upon a Condition precedent, (*viz.*) If *Auguſtine* the Husband ſhould die without Heir Male, and *leaving* a Daughter or Daughters, which cannot be intended having had a Daughter, but leaving a Daughter at the Time of his Death, and *Auguſtine* the Husband leaving no Daughter at his Death, the Truſt of the Term does not ariſe.

Alſo the Proviſo does determine the Term itſelf, and conſequently the Truſt thereof muſt fall; for the Proviſo ſays, that the Term ſhall determine, if *Auguſtine* the Husband ſhall not have a Daughter by *Barbara*, living at his Death; and *Auguſtine* the Husband not having ſuch Daughter living at his Death, the Term is determined; and if the Term be determined at Law, by the expreſs Proviſion of the Parties, it would be very ſtrange for Equity to revive it.

The Intention of the Settlement might be, and probably was, that this Term ſhould ceaſe, and that no Portion ſhould ever, in ſuch Caſe, be raiſed for the Benefit of any Executor or Adminiſtrator, after the Death of the Daughter, for whoſe *perſonal Advantage* this might be deſigned; but in Caſe of her Death in the Life of the Father, the Intent of the Parties might be, to prefer the Heir of the Family, (who, in this Caſe, was the Defendant a Son by an after taken Wife,) before any Executor or Adminiſtrator of a deceaſed Daughter.

Caſe 110.
Lord Chancellor Cowper.
2 Vern. 756.

Long verſus *Short*.

One ſeiſed in Fee of ſome Lands, and poſſeſſed by Leaſe for Years of other Lands, deviſes the Fee to *A.* and the Leaſe to *B.* and dies indebted by Bond. On a Deficiency of Aſſets, both the Deviſees ſhall contribute to the Payment of the Bond; but if the Deviſe to *A.* had been of all the reſt of his Eſtate, then *A.* ſhould have paid the Debts.

ONE ſeiſed in Fee of ſome Lands, and poſſeſſed of a Leaſe for Years in other Lands, and being indebted by Specialty and Simple Contract, made his Will, by which he deviſed a Rent-Charge of 40 *l.* a Year out of the Leaſe for Years to one Grandſon, bequeathed the Leaſe itſelf to another Grandſon, and likewiſe deviſed all his Lands in Fee to *A.* and his Heirs. None of his Deviſees were his Heirs at Law, and his Will was made ſince the (*a*) Statute againſt fraudulent Deviſes.

And there being a Deficiency of Aſſets to pay Debts, the Queſtion was, whether they ſhould be charged on the Real, or Leaſehold Eſtate?

Decreed by *Lord Chancellor*, 1*ſt*, That a Deviſe of a Rent-Charge out of a Term, is as much a Specifick Deviſe, as if it had been of the Term itſelf.

2*dly*, That the Deviſe of a Term for Years is as much a Specifick Deviſe, as a Deviſe of Lands in Fee. Wherefore, each being equally Specifick Deviſes, it would, in this Caſe, be an equal Diſappointment of the Teſtator's Intent, to defeat either, by ſubjecting it to the Teſtator's Debts.

3*dly*, That ſince the Statute of Fraudulent Deviſes, Lands in Fee are equally ſubject to Debts by Specialty in the Hands of the Deviſee, as Leaſes in the Hands of the Executor or Legatee are to Debts by Simple Contract at Common Law.

(*a*) 3 & 4 Gul. & Mar. cap. 14.

So that, to prevent the Diſappointment of the Teſtator's Intent, the Court thought it reaſonable, that the Deviſee of the Fee-Simple Eſtate, and the Deviſees of the Leaſe and Annuity, ſhould each contribute to the Debts by Specialty, in Proportion to the Value of the reſpective Premiſſes; but that as to the Debts by Simple Contract, if there ſhould be not enough, over and above, to pay them, they muſt fall upon the Leaſehold Premiſſes only.

Hereupon it was objected by Sir *Thomas Powis* and Mr. *Vernon*, that the Fee Simple and Inheritance ought to be more favoured, than any of the Perſonal Eſtate and Leaſes; for that the latter had been always decreed to go in Aid of the former, and therefore, in this Caſe, the Leaſehold Eſtate ought to bear all the Debts by Specialty, as far as it would extend.

But over-ruled by *Lord Chancellor*; for that this might utterly diſappoint the Teſtator's Intention in providing for his Grandſons out of the Leaſe; though the Court allowed, that if the Deviſe had been to *A.* of all the reſt of the Teſtator's Lands, this had been a Reſiduary (not Specifick) Deviſe, and the Perſon taking thereby, ſhould not have come in, till after the Debts by Specialty, or otherwiſe, had been paid out of his Inheritance.

Caſe 111.

Drury verſus *Smith*.

Lord Chancellor Cowper.

One by Will diſpoſes of his Perſonal Eſtate, and afterwards by Parol gives 100 *l.* Bill to one, to deliver over to his Nephew, if the Teſtator ſhould die of that Sickneſs; ſuch Gift decreed good.

A. Had a Nephew, and being about making his Will, directed the Scrivener imployed by him for that Purpoſe, to give 100 *l.* to his Nephew; afterwards the Teſtator, recollecting that his Nephew had 100 *l.* of his in his Hands, therefore ordered the Scrivener not to put the Legacy into his Will, in regard his Nephew had already that 100 *l.* in his own Hands, and the Teſtator made *B.* (that was his Niece) Executrix and reſiduary Legatee.

Afterwards the Nephew came, and brought a Specie Bill for this 100 *l.* to the Teſtator, who, in his laſt Sickneſs, gave the ſaid 100 *l.* Bill to be delivered over to his Nephew, in Caſe he [the Teſtator] ſhould die of that Sickneſs, which did accordingly happen.

And now, on the Nephew's bringing a Bill againſt the Executrix, for this 100 *l.* Note, it was objected, that this being a Parol Gift, and contrary to the Will by which the Executrix was made reſiduary Legatee, it would introduce all the Inconveniences of Perjury which the Statute of Frauds intended to prevent, if ſuch Evidence, or verbal Diſpoſitions, ſhould prevail againſt the Will, and would be contrary to the Words of the (*a*) Statute, which ſay, a Will in Writing ſhall not be revoked by Parol.

(*a*) Sect. 22.

Lord Chancellor: The Caſe is not ſo ſtrong, as if this very 100 *l.* Note had been ſpecifically deviſed; for deviſing the *Reſiduum*, is only the reſt of his Eſtate, that he ſhould not, by Will, or otherwiſe diſpoſe of; but this is a Gift in the Teſtator's Life-Time, *Donatio Cauſâ Mortis*, and the Poſſeſſion tranſmuted, and certainly, notwithſtanding the Will, the Teſtator had a Power to give away any Part of his Eſtate in his Life-time; he might in his Life-Time, after the making of his Will, give away any Part of his Eſtate *abſolutely*, and by the ſame Reaſon might, notwithſtanding the Will, give away any Part thereof *conditionally*; and this Gift being ſo fully proved:

Decree the Plaintiff his 100 *l.* Bill with Coſts.

Memorandum, in the Caſe of *Smyth* verſus *Caſen*, (8th *Dec.* 1718.) the Maſter of the Rolls, where Jewels were given by the Teſtator by way of *Donatio Cauſâ Mortis*, doubted, whether this was good againſt Debts. And it ſeems not; they being given in Caſe of the Donor's Death, and in Nature of a Legacy, which therefore would be fraudulent as againſt Creditors.

Caſe 112.

Biſhop of Wincheſter verſus *Knight*.

Lord Chancellor Cowper.

Lord of a Manor may bring a Bill for an Account of Oar dug, or Timber cut, by Defendant's Teſtator; otherwiſe of plowing up Meadow or ancient Paſture, or ſuch Torts as die with the Perſon.

ONE held cuſtomary Lands of the Biſhop of *Wincheſter*, as of his Manor of *Taunton-Dean* in *Somerſetſhire*, in which Lands there was a Copper Mine that was opened by the Tenant, who dug thereout, and ſold great Quantities, of Copper Oar, and died, and his Heir continued digging and diſpoſing of great Quantities of Copper Oar out of the ſaid Mine.

The Biſhop of *Wincheſter* brought a Bill in Equity againſt the Executor and Heir, praying an Account of the ſaid Oar, and alledging, that theſe Cuſtomary Tenants were as Copyhold Tenants, and that the Freehold was in the Biſhop, as Lord of the Manor and Owner of the Soil, and that the Manner of paſſing the Premiſſes was, by Surrender into the Hands of the Lord, to the Uſe of the Surrenderee.

On the other Side it was ſaid, that it did not appear the Admittance, in this Caſe, was to hold *ad voluntatem Domini, ſecundum Conſuetudinem, &c.* without which Words [*ad voluntatem Domini*] it was inſiſted, there could be no Copyhold, as had been adjudged (*a*) in Lord C. J. *Holt*'s Time.

(*a*) Salk. 365. *Crowther* verſus *Oldfield*, & *Carth.* 432. *Gale* verſus *Noble*.

Then, as to the Oar dug in the Anceſtor's Life-time, there was no Colour to aſk Relief; becauſe this being a Perſonal Tort, the ſame died with the Perſon, and that with Reſpect to the Oar dug in the Heir's own Time, there could be no Remedy; for that theſe Cuſtomary Tenants were as Freeholders, and there was full Proof, that they, from Time to Time, had uſed to cut down and fell Timber from off the Premiſſes, and had alſo dug Stone and ſold it.

Lord Chancellor: It would be a Reproach to Equity, to ſay, where a Man has taken my Property, as my Oar, or Timber, and diſpoſed of it in his Life-Time, and dies, that, in this Caſe, I muſt be without Remedy.

It is true, as to the Treſpaſs of breaking up Meadow, or ancient Paſture Ground, it dies with the Perſon; but as to the Property of the Oar, or Timber, it would be clear even at Law, if it came to the Executor's Hands, that Trover would lie for it; and if it has been diſpoſed of in the Teſtator's Life-Time, the Executor, if Aſſets are left, ought to anſwer for it; but it is ſtronger in this Caſe, by reaſon that the Tenant is a Sort of a Fiduciary to the Lord, and it is a Breach of the Truſt which the Law repoſes in the Tenant, for him to take away the Property of the Lord; ſo that I am clear of Opinion, the Executor, in ſuch a Caſe, is anſwerable.

As to the Evidence that the Tenant might do one Sort of Waſte, as to cut down and diſpoſe of the Timber, this might be by Special Grant; but it is no Evidence that the Tenant has a Power to commit any other Sort of Waſte, (*viz.*) Waſte of a different Species, as that of diſpoſing of Minerals; but a Cuſtom impowering the Tenants to diſpoſe of one Sort of Mineral, as Coals, may be an Evidence of their right to diſpoſe of another Sort of Mineral, as Lead out of a Mine.

But this Queſtion being doubtful, and at Law, let the Biſhop bring his Action of Trover as to the Oar dug and diſpoſed of by the preſent Tenant.

Accordingly this was tried, and there never having been any Mine of Copper before diſcovered in the Manor, the Jury could not find, that the cuſtomary Tenant might, by Cuſtom, dig and open new Copper Mines; ſo that upon the producing of the *Poſtea*, the Court held, that neither the Tenant without the Licence of the Lord, nor the Lord without the Conſent of the Tenant, could dig in theſe Copper Mines, being new Mines.

Caſe 113.

At the Rolls.

Chancey's Caſe.

One being indebted to his Servant for Wages in 100 *l.* gives her a Bond for this 100 *l.* as due for Wages, and afterwards by Will gives her 500 *l.* for her long and faithful Services. This is not a Satisfaction for the Bond.

ONE being indebted for Wages to a Maid Servant, who had lived with him for a conſiderable Time, gave her a Bond for 100 *l.* and in the Condition of the Bond, it appeared to be *for Wages*; afterwards the Teſtator by his Will, among other Things, gave a Legacy of 500 *l.* to his Maid-Servant, and it was mentioned in the Will to be given to her *for her long and faithful Services.* The Maid-Servant having, on her Maſter's Death, poſſeſſed herſelf of divers Goods that were his, the Plaintiff *Chancey*, who was the Executor, brought his Bill againſt her for an Account, but paid to her the 100 *l.* and Intereſt ſecured to her by the Bond.

For the Defendant it was objected, that ſhe ſhould have both the Money due on the Bond, and alſo the Legacy; for the Legacy was a further Reward for her Services, and intended to be a Gift *in toto:* Whereas if the Bond were to be taken out of it, it would be only a Gift of 400 *l.* and as to the old Notion, that the Teſtator muſt be juſt, before he is bountiful, that was nothing, where the Teſtator had wherewithal to be both juſt (*a*) and bountiful.

(*a*) Salk. 155.

Beſides, that this was not inſiſted upon by the Bill, ſo that the Defendant had no Notice or Warning to prove, that the Teſtator intended to give her the full Legacy of 500 *l.* over and above the Bond: Which Proof (though by Parol only) had yet been frequently admitted.

Alſo, for that it appeared the Executor himſelf had paid the Bond, and taken a Receipt for it.

Maſter of the Rolls: It is ſufficient that it appears the Creditor has a greater Legacy given her, and the Plaintiff the Executor prays Relief, which is as much as if he had prayed, that he might not be compelled to pay both the Debt and Legacy.

This is ſtronger than the uſual Caſe; for the Bond is *for Service*, and the 500 *l.* Legacy is *alſo for Service*; ſo that it is a greater Reward and Satisfaction for the ſame Thing; neither is it material that the Executor has paid it, for he was bound to pay the Bond at Law, and his only Method is, to ſtop it out of the Legacy; but clearly, ſuch a Legacy is not a Satisfaction for Service done to the Teſtator (*b*) after the making of the Will.

(*b*) Vide Salk. 508. & 2 Vol. 343.

This

* Trinity 1725.

This Decree was afterwards * reverſed by Lord Chancellor *King*, upon which Occaſion his Lordſhip ſaid, he was not for breaking in upon any general Rule, though he did not ſee any great Reaſon, why, if one owed 100 *l.* to *A.* by Bond, and ſhould afterwards give him a Legacy of 500 *l.* this Legacy muſt go in Satisfaction of the Debt; for if ſo, the whole 500 *l.* would not be *given*, in regard 100 *l.* of it would be *paid* towards a juſt Debt which the Teſtator could not help paying; and therefore the whole 500 *l.* would not be given, againſt the expreſs Declaration of the Teſtator, who ſays he *gives* the ſame; and though it ſeemed to have obtained as a Rule, that a Man ſhould be juſt before he is bountiful, yet when a Man left ſuch an Eſtate and Fund for his Debts and Legacies, as that he might thereout be both juſt and bountiful, and eſpecially, when there ſeemed to be not only *an Intention*, but alſo *expreſs Words* to that Purpoſe, in ſuch Caſe his Lordſhip did not ſee, but it would be as reaſonable that the whole Legacy ſhould take Effect as a Legacy, and that the Debt ſhould be paid beſides.

And it was ſaid at the Bar, by Mr. *Talbot*, to have been a ſtrange Reſolution, that if I owe a Man 100 *l.* and give him 100 *l.* Legacy, then I give him nothing, but only pay him what I am bound to do; but if the Legacy be twenty Shillings leſs, (*viz.*) 99 *l.* here it is a good Gift and Legacy, excluſive of the Debt.

However, the Court ſaid, they were not, by this Reſolution, overturning the General Rule: But that this Caſe was attended with particular Circumſtances varying it from the common Caſe, (*viz.*) That the Teſtator by the expreſs Words of his Will, had deviſed "that all his Debts and Legacies ſhould be paid;" and this 100 *l.* Bond being then a Debt, and the 500 *l.* being a Legacy, it was as ſtrong, as if he had directed that both the Bond and Legacy ſhould be paid; that when the Teſtator gave a Bond for the 100 *l.* Arrear of Wages, it was the ſame Thing as paying it; and as, if he had actually paid it, and had afterwards given the Legacy of 500 *l.* the Executor could not have fetched back the 100 *l.* and made the Defendant refund, ſo neither ſhould the Bond in this Caſe be ſatisfied by the Bequeſt of the Legacy.

His Lordſhip alſo obſerved, that the Executor (the Plaintiff Mr. *Chancey*) did not himſelf take this 500 *l.* Legacy to be a Satisfaction for the Bond, as appeared by his having voluntarily paid the 100 *l.* to the Defendant, and that his Lordſhip was of the ſame Opinion.

So the Decree at the Rolls was reverſed, and the Defendant (the Maid Servant) had both her Debt and Legacy.

Anonymus.

Caſe 114.

Where Equity will give Leave to file an Original, and where not.

UPON a Petition to the Maſter of the Rolls, for Leave to file an Original, after a Writ of Error brought to reverſe a Judgment, His Honour, having taken Time to conſider of it, and likewiſe of another Caſe, where, upon a Judgment by Confeſſion, the Court gave ſuch Leave, and having ſpoken with Mr. *Hetherington* (an antient Officer of the Court) at length denied Leave to file the ſaid Original, ſaying, that where a Judgment is given by Confeſſion, as the Defendant, in ſuch Caſe, conſents that there ſhall be Judgment awarded againſt him, ſo does he likewiſe, by

Implication, conſent to all thoſe Means without which the Judgment cannot be effectual, and conſequently, that an Original ſhall at any Time be filed, eſpecially if ſuch Judgment was given as a Security for Money, or other valuable Conſideration. But that it is otherwiſe where Judgment is given by Default, or on Demurrer, *&c.* and that there is alſo a Difference where the Omiſſion proceeds from the Ignorance or Neſcience of the Clerk, and where it is by Miſtake or Miſpriſion, for in the former (*a*) Caſe it is not to be helped; and ſuch Leave to file an Original as aforeſaid, ought not to be given, without very ſpecial Reaſon; for this would be a Wrong to the Crown, and to the Officer, no Originals being then likely to be filed, unleſs where the Party ſhould find himſelf in Danger of having his Judgment reverſed.

(*a*) Vide *Blackamore's* Caſe, 8 *Co.* 159. *a. b.*

The Court further declared, that they were the rather induced to deny Leave to file an Original, in the Principal Caſe, in regard, if this Judgment were reverſed, (it being upon a Policy of Inſurance,) the Plaintiff might begin a new Action. *Secus*, had it been in a *Quare Impedit*, or in an Action againſt the Hundred for a Robbery, where the Suit muſt be commenced within a (*) limited Time; or if the Time had been ſo far elapſed, as that the Statute of Limitations had been a Bar, if the Judgment ſhould be reverſed.

Afterwards in *June* 1719. in another Cauſe, on a Petition to the Maſter of the Rolls for Leave to file an Original, upon Affidavit that the Plaintiff's Attorney had been ill, and diſordered in his Head, by which Means

---

(*) Vide 3 Lev. 347. *Beachcroft* verſus *The Hundred of Burnham*, where for this Reaſon, (*viz.*) becauſe the Time for bringing the Action was elapſed, the Court gave Leave to amend after Iſſue was joined, and the Jury had appeared at the Bar.

Means an Original was omitted to be filed; and a Writ of Error being brought, in this Caſe, to reverſe the Judgment for want of ſuch Original, in which Writ of Error Bail was given:

Cur': Take Leave to file the Original, but pay the Coſts of the Writ of Error hitherto, and let the Bail in the Writ of Error be diſcharged.

DE

Term. Paſchæ,

1718.

Caſe 115.

Copeland verſus *Stanton*.

Where a Witneſs dies after Examination, but before ſuch Examination is ſigned by him, the Depoſitions cannot be made uſe of.

A Witneſs on the Part of the Defendant was ſworn, and having appeared before the Examiner, was examined to ſeveral Interrogatories, after which he was appointed by the Examiner to come another Day, but the next Morning was ſuddenly taken ill, and died.

Upon which, I moved the Maſter of the Rolls, that the Witneſs's Depoſitions, ſo far as they were taken, might be made uſe of, which, without the Order of the Court, could not be, the Witneſs not having ſigned his Examination.

But his Honour, having adviſed with Sir *Thomas Geery*, the Maſter then in Court, denied the Motion, for that the Examinations were imperfect, and could not be made uſe of.

It ſeems, after the Witneſs is fully examined, the Examinations are read over to him, and the Witneſs at Liberty to amend or alter any Thing, after which he ſigns them, and then (but not before) the Examinations are compleat, and good Evidence.

In *Michaelmas* Term 1722. in the Caſe of *Debrox* verſus —— The Defendant, after an Order for Publication, examined a Witneſs, and then firſt conceiving himſelf irregular in examining this Witneſs (it being after Publication) got an Order (upon Petition and an Affidavit from himſelf, his Clerk in Court and Solicitor, that they had not, nor would ſee any of the Depoſitions) that he might re-examine the ſaid Witneſs; but before there could be a Re-examination of this Witneſs, he died; and upon Affidavit of this, *Lord Chancellor Parker* ordered, that the Defendant might make uſe of the Depoſitions taken of this Witneſs, the Re-examination of him having been prevented by the Act of God.

But yet, where the Defendant after Publication, examined a Witneſs, and on the uſual Affidavit that the Defendant, his Clerk or Solicitor, had not ſeen the Depoſitions, got an Order to re-examine this Witneſs, but the Witneſs died before a Re-examination, the Court gave Leave to the Defendant to make uſe of the former Depoſitions of the ſame Witneſs.

Trafford verſus *Aſhton.*

Caſe 116.

Lord Chancellor Parker.

Truſt of a Term to raiſe Portions out of Rents and Profits to be paid as ſoon as conveniently might be.

SIR *Ralph Aſhton* ſeiſed in Fee of a great Real Eſtate in *Lancaſhire*, upon his Marriage, ſettled the ſame upon himſelf for Life, Remainder to his Wife for Life, Remainder to Truſtees for ninety-nine Years, Remainder to his firſt, *&c.* Son, Remainder to the firſt and every other Son of his Brother *Richard Aſhton*, in Tail Male ſucceſſively.

The

By Virtue of the Word (Profits) Truſtees may ſell or mortgage; *ſecus* if ſaid annual Profits.

The Truſt of the Term of ninety-nine Years was declared to be, that if Sir *Ralph Aſhton* ſhould die without Iſſue Male by the ſaid Marriage, and ſhould leave one or more Daughters, then the Truſtees ſhould, *out of the Rents and Profits*, raiſe 8000 *l.* for the Daughters of that Marriage, to be paid them as *ſoon as conveniently could be*, without limiting any expreſs Time when the Portions were payable; but then a further Truſt of the Term was declared, that if there ſhould be a Son and a Daughter or Daughters by the Marriage, in ſuch Caſe, the Truſtees ſhould, as ſoon as poſſible, raiſe 1000 *l.* a-piece for the Daughters, payable at twenty-one or Marriage.

This Term of ninety-nine Years was not made without Impeachment of Waſte.

Sir *Ralph Aſhton*'s Lady dies firſt, afterwards Sir *Ralph* dies without Iſſue Male, and leaving three Daughters (the Plaintiffs) all married, and the Remainder in Tail becomes veſted in the Defendant his Nephew, the preſent Sir *Ralph Aſhton*.

The Queſtions were, *firſt*, Whether this 8000 *l.* ſhould be raiſed otherwiſe than out of the yearly Rents and Profits, or by Sale or Mortgage?

And 2*dly*, Whether it ſhould carry Intereſt, and from what Time?

For the Defendant it was ſaid, that it was well known the three Daughters had a very great Eſtate in Land left them as Heirs General of this antient Family, and that it could not but be intended by the late Sir *Ralph Aſhton*, that the Defendant, who was to ſupport his Name and Honour, who was his Nephew, and whom he had made as his adopted Son, ſhould have wherewithal to live, and maintain the Honour.

That the 8000 *l.* being to be raiſed by Rents and Profits, it muſt be intended *yearly Rents*, and *yearly Profits*; and if ſo, it was plain there could be no Sale or Mortgage.

That the Intention of the Settlement was, to preſerve the Eſtate in the Name and Family, as long as might be; and conſequently not to ſell or mortgage, or to give any Power for that Purpoſe.

That had it been ſo intended, it would have been ſo expreſſed, (*viz.*) that the Truſtees might raiſe the Portions by *Sale* or *Mortgage*, and the rather, for that this was the general Way of penning Settlements.

That the Term of ninety-nine Years not being made without Impeachment of Waſte, this was an Indication, that the Truſtees were ſo far from being inveſted with a Power to ſell any Part of the Eſtate, that they were not intruſted with cutting down a Tree from off it.

That here was no certain Time limited when theſe Portions were payable, it being only ſaid, *as ſoon as conveniently might be*; as ſoon as conveniently? That is, with Convenience to the Nephew, and not ſo as to diſtreſs *him*.

That if in ſome Caſes the Word [Profits] was conſtrued to extend to the Profits of the Land ariſing by Sale, if ever Equity had gone ſo far, it muſt be, where an expreſs certain Time was limited; and under thoſe Circumſtances, rather than not comply with ſuch expreſs Limitation, and where the annual Profits would not raiſe it by that Time, the Court might conſtrue the Word [Profits] to extend (*a*) to Profits by Sale; but never made ſuch Conſtruction, where no expreſs Time was appointed, and where the Sum in convenient Time might be raiſed.

That in the Caſe of Mr. *Byde* of *Ware-Park* in *Hertfordſhire*, where a Portion was ſecured to his Siſter, to be raiſed by Rents and Profits, the Court did not only raiſe it by Rents, but confined the ſame to ſo much a Year, as that Mr. *Byde* might have whereupon to live out of the Reſidue.

2*dly*, It was argued, That as to Intereſt, where the Portion was to be paid out of the yearly Rents, the Party muſt take it ſo; and there was no Default in Payment, there being no expreſs Time appointed for paying the Portion; it was the Plaintiffs own Fault, if they would not enter; whereas if the Defendant was in no Default, he ought not to pay Intereſt, for Intereſt is only given in (*b*) Default of Payment.

On the other Side it was ſaid by Counſel, and ſo ruled by the Court, that the Daughters were *Purchaſors* of Portions, by their Mother's Marriage, and the Marriage Portion; but the Limitation to the Defendant, the preſent Sir *Ralph Aſhton*, was *voluntary*.

That the Meaning of the Word [Portion] was a Proviſion for Marriage, but the leiſurely way of raiſing Money by yearly Rents, would not anſwer ſuch End.

That the Words [Profits of Lands] eſpecially when to pay Debts or Portions, implied any Profits that the Land would yield, either by ſelling or mortgaging; and that this had been the conſtant Conſtruction in the like Caſes, and 2 *Chan. Caſes* 205. *Lingen* verſus *Foley*, was cited

---

(*a*) 2 Vol. 19.

(*b*) Poſt in the Caſe of *Butler* verſus *Duncombe*, 458.

cited, where Lands were deviſed to Truſtees, in Truſt out of the Rents and Profits to pay Debts and Legacies, and the Truſtees decreed to ſell the Land itſelf; as alſo 1 *Chanc. Caſes* 176. where the Difference is taken betwixt annual Profits, and Profits generally, and in which Place it appears from many Inſtances, that where Daughters Portions were directed to be raiſed out of Rents and Profits, and were made payable at a fixed Day, and the annual Profits would not raiſe the Portions by (*a*) that Day, the Court has decreed a Sale. Alſo the Caſe of (*b*) *Warburton* and *Warburton* was cited.

(*a*) Preced. in Chanc. 586.
(*b*) 2 Vern. 420.

It was moreover inſiſted, that here was a certain Time appointed for Payment of the Portions, and that implied, though not expreſſed; *viz.* it was ſaid, they ſhould be paid *as ſoon as conveniently might be*; now that was *preſently*, for the Daughters being twenty-one at Sir *Ralph Aſhton*'s Death, and marriageable, it was *then* convenient they ſhould have their Portions.

That though (*c*) *yearly* Profits might make a Difference, yet here that was not material, the Word [yearly] being omitted.

(*c*) 1 Vern. 104.

That the Portions being payable preſently on the Death of Sir *Ralph*, (the Daughters being then twenty-one;) they conſequently would carry Intereſt, and the rather, ſince they were to ariſe out of Land, which yielded yearly Rents and Profits.

Lord Parker farther obſerved, that by the Truſt, if there were a Son and a Daughter, or Daughters by the Marriage, the Son ſhould pay Intereſt to his Siſters for their Portions, from their Age of twenty-one or Marriage, and it could not be imagined that Sir *Ralph* would be kinder to his Nephew in excuſing him from paying Intereſt, than to his own Son, if he had one, who was bound to pay Intereſt. Wherefore it was decreed, that the Portions ſhould be raiſed by Sale or Mortgage, as ſhould be agreed by the Maſter and the Parties, with Intereſt from Sir *Ralph*'s Death, and Coſts.

Ratcliff verſus *Roper*.

Caſe 117.

Lord Chancellor Parker.

If the Party's Clerk in Court be dead, no Proceſs can be taken out againſt the Party until he has appointed a new Clerk in Court, and a *Subpœna ad faciend' Attorn.* muſt be taken out for that Purpoſe.

IN this Cauſe a Decree was made for a Sale of the Eſtate for the Payment of Debts, and a Purchaſor approved of and confirmed; there was likewiſe an Order, that all Parties ſhould join, *&c.*

And on Affidavit that one of the Parties refuſed to be ſpoke with, ſo as to be ſerved with the Writ of Execution, though it was allowed to be a Motion of Courſe, on Affidavit of this Matter, that Service of the Clerk in Court might be good Service, yet where the Clerk in Court appears to be dead (as he did in this Caſe) there the Court ſaid, they would make no Order, but a *Subpœna ad faciend' Attornat.* muſt be taken out and ſerved; becauſe, till then, the Party is not in Court.

It was alſo allowed, that the Service of the *Subpœna ad faciend' Attorn'* would be good, if left at the Houſe, and that though the Party in this Caſe denied himſelf, yet ſtill the *Subpœna* might be left at his Houſe.

Maſters verſus *Sir Harcourt Maſters.*

Caſe 118.
At the Rolls.

MRs. *Mary Maſters* by her Will left ſeveral Legacies to ſeveral of her Relations and others; for inſtance, to her Nieces *A. B.* and *C.* pecuniary Legacies, (*viz.*) to *A.* and *B.* 200 *l.* a-piece, and to her Niece *C.* 400 *l.* and having a Mother living, gave all her houſhold Goods, after her Mother's Death, to be divided among her ſaid three Nieces, and alſo the beſt of her Cloaths; ſhe likewiſe by her Will gave ſeveral ſpecifick Legacies, and to the Poor of two Hoſpitals in *Canterbury* (naming them) 5 *l.* a-piece; as to her Lands ſhe deviſed them to her Nephew and Heir at Law, the Defendant Sir *Harcourt Maſters, but charged the ſame with the Payment of her Legacies abovementioned,* and made the Defendant Sir *Harcourt* Executor.

Afterwards her Mother died, by which a conſiderable Increaſe of Perſonal Eſtate came to her, and thereupon ſhe made a Codicil, thereby giving ſeveral pecuniary Legacies to ſeveral, to whom ſhe had before given Legacies by her Will, many of which Legacies were larger than what were given them by her Will, and gave 5 *l. per Annum to all and every the Hoſpitals,* (without ſaying where the Hoſpitals were) and left Annuities to ſeveral of the pecuniary Legatees in the Will, and gave to her ſaid three Nieces, *A. B.* and *C.* all (leaving a Blank) to be equally divided, and her Cloaths; and among her Legacies which were in Figures, ſome of them were writ ſo blindly (ſeeming to have been altered) that it was difficult, if not impoſſible to read them, or to diſtinguiſh what the Legacies were; particularly in one Place, whether 100 *l.* or 300 *l.* was meant; and ſhe gave to Mrs. *Sawyer* 200 *l.* when there was no ſuch Perſon ever known to her, but it was alledged that ſhe meant one Mrs. *Swopper*; ſhe likewiſe bequeathed to her ſaid three Nieces *A. B.* and *C.* 50 *l.* a Year for their Lives, and left 200 *l.* for a Monument for her Mother, after which ſhe died.

Her Codicil happened not to be atteſted by any Witneſs, and ſo, as was admitted, could charge no Land.

It was alſo admitted, that both her Real and Perſonal Eſtate were deficient in Value to pay the Legacies and Annuities given by her Will and Codicil.

The Defendant Sir *Harcourt* proved her Will and Codicil, and upon a Bill brought for the Payment of ſeveral of the Legacies to ſeveral of the Plaintiffs,

1*ſt*, It was decreed by the Maſter of the Rolls, that the Perſonal Eſtate not being ſufficient to pay the Legacies both by the Will and Codicil, and the Real Eſtate being liable to the Legacies by the Will, and not to thoſe by the Codicil, the Eſtate ſhould be ſo marſhalled, that, as far as poſſible, the whole Will might take Effect, and all the Legacies be paid.

One gives Legacies by his Will, and other Legacies by his Codicil, and the Lands are charged with the Legacies in the Will only, and the Perſonal Eſtate is not ſufficient to pay all the Legacies; the Legacies in the Will ſhall be charged on the Land, and the Legacies by Codicil on the Perſonal Eſtate.

And therefore, that the Legatees in the Will ſhould be paid out of the Real Eſtate, and if that ſhould be deficient, they muſt, as to the Surplus, come in Average with the Legatees in the Codicil, to be paid out of the Perſonal Eſtate; and, there being admitted to be a Deficiency, that the Land ſhould be forthwith ſold to prevent a greater Deficiency, but that the Specific Legacies muſt be all paid, and not (*a*) abate in Proportion; on the contrary, that the (*b*) Charities, though preferred

(*a*) Vid. poſt *Hinton* verſus *Pinke*, 539.

(*b*) Vid. ante *Tate* verſus *Auſtin*, 265. & poſt *Att. Gen.* verſus *Hudſon*, 675.

ferred by the Civil Law, yet they ought to abate in Proportion, for they were but Legacies.

But it was objected, that the two hundred Pounds given for a Monument for the Mother, ought not to abate in Proportion, this being a Debt of Piety to the Memory of her Mother, from whom the Teſtatrix received the greateſt Part of her Eſtate. And to this the Court inclined, but however reſerved that Point.

Specific Legacies not to come into Average, but Charity Legacies that are pecuniary, ſhall come into Average, as well as other pecuniary Legacies. Whether a Legacy of 200 *l.* given by the Teſtator for a Monument ſhall come into Average, *Qu.*

2*dly*, That the Will charging the Real Eſtate with the Payment of the Legacies *abovementioned*, it could not extend to the Legacies in the Codicil; but if the Real Eſtate had been charged with the Payment of the Teſtatrix's Legacies in general, it would have taken in the Legacies in the Codicil, they being as much her Legacies, as thoſe in the Will.

Real Eſtate is by Will charged with the Payment of the Legacies abovementioned; this will not extend to the Legacies in the Codicil; *ſecus* if the Land were charged with the Payment of the Legacies generally.

3*dly*, It being objected, that whereas the pecuniary Legacies in the Codicil exceeded the Legacies in the Will, and were given to the ſame Perſons, this ſhould be in Satisfaction of the Legacies in the Will, and that the Legatees ſhould not have both; and particularly, that where the Annuities given by the Codicil were of greater Value than the Legacies in the Will, and were given to the ſame Perſons, they ſhould be a Bar to ſuch Perſons from claiming both:

Pecuniary Legacies are given by Will, and afterwards greater Legacies to the ſame Perſons by Codicil; theſe no Satiſfaction for the Legacies in the Will, but the Legatees to have both, becauſe the Codicil is Part of the Will.

Cur': The Annuities by the Codicil, though given to the ſame Perſons that were pecuniary Legatees in the Will, and though of greater Value, yet ſhall not be taken to be a Satisfaction for the pecuniary Legacies given by the Will;

becauſe the Annuities are not *ejuſdem generis,* and the Annuitants might die the next Day after the Death of the Teſtatrix, and nothing being more uncertain than Life, conſequently the latter Gifts inſtead of being a Bounty, might be a Prejudice, if taken to be in Satisfaction of the Legacies by the Will.

4*thly,* The Court declared, that the Codicil was Part of the Will, and proved as Part thereof, and that the greater Pecuniary Legacy, given by the Codicil to the ſame Perſon that was a Pecuniary Legatee in the Will, ſhould not be taken to be a Satisfaction, unleſs ſo expreſſed; that it was, as if both the Legacies had been given by the ſame Will; and it ſeemed a Circumſtance tending to prove, that the Teſtatrix intended additional Bounties, inaſmuch as ſhe, after the making the Will, and before her making the Codicil, had an additional Eſtate from her Mother.

Bequeſt of Houſhold Goods extends to all Houſhold Goods purchaſed afterwards, and that are in the Houſe at the Teſtator's Death.

5*thly,* On its being inſiſted, that the Deviſe of the Houſhold Goods to the Teſtatrix's three Nieces, could not paſs thoſe Houſhold Goods which the Teſtatrix had not at the making of the Will, but came to the Poſſeſſion of afterwards, by the Death of her Mother, and that the Codicil would not ſupply it; for the Codicil gives all (with a Blank) to her three Nieces:

Cur': The Deviſe of all one's Houſhold Goods will paſs all Houſhold Goods that the Teſtator has at the Time of his (*a*) Death; *contra* of a Deviſe of all one's Lands, for that will paſs only the Lands which the Teſtator then had. But Houſhold Goods are always changing, and periſhing; and therefore the Will, as to Perſonal Eſtate, ſhall relate to the Time of the Teſtator's Death; otherwiſe it would be very inconvenient; for then a Man muſt make a new Will every Day; alſo the Codicil ſhould, had there been occaſion, have been

(*a*) Salk. 237. & poſt *All Souls College* verſus *Coddrington,* 598. and ſee the Reaſon for this Diſtinction *poſt* in *Wind* verſus *Albone,* 575.

been explained by the Will, though here the Will is ſufficient without the Codicil; and as to Plate, (a) if commonly made uſe of by the Family, the ſame ſhall paſs * as Houſhold Goods.

(a) 2 Vern. 638. Sed Vide Preced. in Chanc. 207. contra. Plate in common Uſe in a Family ſhall paſs as Houſhold Goods.

6*thly*, Where the Will was writ blindly, and hardly legible, and as to the Money-Legacies writ in Figures, it was ordered to be referred to the Maſter to examine, and ſee what thoſe Legacies were, and he to be aſſiſted by ſuch as were ſkilled in the Art of Writing.

Where the Will is writ blindly, and hardly legible, and the Legacies in Figures, Court referred it to a Maſter to examine what thoſe Legacies were, and the Maſter to be aſſiſted with ſuch as underſtood the Art of Writing.

7*thly*, Likewiſe as to the Legacy of 200 *l.* to Mrs. *Sawyer*, the Maſter to examine, who the Teſtatrix meant thereby, and whether the Teſtatrix meant Mrs. *Swopper*, who was the Perſon that contended for the ſame; and if the Maſter ſhould find ſhe was the Perſon intended, then ſhe to receive her Legacy in Proportion with the other Legatees.

Legatee's Name very falſly ſpelt, referred to a Maſter to ſee who was intended.

8*thly*, As to the 5 *l. per Ann. to all and every the Hoſpitals*, it appearing that the Teſtatrix lived in *Canterbury* for many Years, and died there, and that ſhe took Notice by her Will of two *Canterbury* Hoſpitals, this Charity was held not to be void for the Incertainty, but to have been intended *for all the Hoſpitals in Canterbury*; but not to extend (as was preſſed) to the Hoſpital about a Mile out of *Canterbury*, though

One by Will gives 5 *l. per Ann.* to all and every the Hoſpitals, and it was proved the Teſtatrix lived in a Place where there where Hoſpitals; it ſhall be taken to be theſe Hoſpitals, and not to extend to another Hoſpital about a Mile from thence, though founded by the ſame Perſon.

---

* It was formerly held, that by the Deviſe of all the Teſtator's Furniture or Houſhold Goods, Plate in common Uſe would not paſs, in Regard this was but *Curta Supellex*; but as the Nation grew richer, and Plate became a more common Furniture, it has been conſtrued to be included within thoſe Words. By the Maſter of the Rolls in the Caſe of *Budgen* verſus *Elliſon & Ux'*, *Paſchæ* 1731.

founded by the ſame Archbiſhop of *Canterbury*, and governed by the ſame Statutes. And this the Court decreed, notwithſtanding it was objected, that they ought not to go out of the Words of the Will and confine the general Words [all Hoſpitals] to thoſe in *Canterbury*; and the Court did this the rather, becauſe theſe Charities, if they prevailed, would be Perpetuities of 5 *l.* *per Ann.* and by that Means create a Deficiency, and conſequently in a great Part defeat the reſt of the Will, as to plain Legacies, in Favour of thoſe that were doubtful.

9thly, Whereas in ſome Part of the Will it was writ *Hoſpitals*, and in ſome *Spittals*:

Hoſpitals and Spittals the ſame.

Cur': It is the ſame Thing; for Spittal is the Abbreviation of Hoſpital, and thence come the Spittal Sermons.

Caſe 118.

Lord Chancellor Parker.

Hewet verſus *Ireland*.

Proviſion for Daughters to be born ſhall extend to Daughters then begotten.

HUſband and Wife have Iſſue a Daughter, and a Proviſion is made, by Deed and Fine, out of the Eſtate of the Wife after Marriage, for ſecuring 600 *l.* in Truſt that ſhe ſhall have the Intereſt during her Life, and afterwards in Truſt that the 600 *l.* ſhall be paid to ſuch Daughter or Daughters, as *ſhall* be begotten by the Huſband on the Wife, ſuch Payment to be made at their Ages of eighteen or Marriage, which ſhall firſt happen, the Intereſt in the mean Time to go for Maintenance, and if no ſuch Daughter, then to the Huſband.

The Fact happened to be, that at the Time of the executing of this Deed, there was a Daughter of the Marriage about ten Years of Age, and no *Daughter born afterwards*; and the Mother ſoon after died.

Where-

Whereupon it was objected, that the Daughter born before the making of this Deed, *&c.* ſhould not take; becauſe it was ſaid ſuch Daughters as *ſhall* be begotten, which are Words of *Futurity.*

Lord Chancellor: The Parents could never intend to neglect a Daughter which *was* born, and yet ſo young, as not to be capable of offending them, (*viz.* being but ten Years old) and at the ſame Time to take Care of a Daughter *to be* born, and which might never be born, and in Fact never was; for which Reaſon, if the Words can bear any Interpretation, the Daughter born before ſhall take.

Beſides, as *Procreatis* takes in Children *to be begotten*, (*a*) and *Procreandis* includes Children *then begotten*, and as the Words uſed here, ſeem only to be meant for the Words [begotten or to be begotten] I am of Opinion, that this Daughter, though born before, ſhall take; alſo the Words [which ſhall be begotten] ſhall relate to the Death of the Wife, and then the Daughter born before, is included under that Deſcription.

(*a*) 1 Inſt. 20. b. 2 Vern. 545, 711. Preced. in Chan. 491. Ante 231. in *Long* and *Beaumont*, & 2 Vol. 33. *Gore* verſus *Gore.*

It is like the Caſe in (*b*) *Cro. Car.* 185. and cited by Lord C. J. *Hale*, in 1 *Vent.* 230. where a Man deviſed to his eldeſt Son and the Heirs of his Body, after the Death of his Wife, and if he died, living the Wife, then to the Teſtator's Second Son and the Heirs of his Body, the firſt Son died, living the Wife, *but leaving Iſſue*, and it was ſtrongly urged, that his Eſtate ſhould ceaſe, for that it being ſaid *if he died, living the Wife*, this explained what went before; but it was ruled by all the Court, that it was an abſolute Eſtate-Tail in the eldeſt Son, and as if the Words had been, if he died *without Iſſue*, living the Wife. For the Father could not be thought to intend to prefer a younger Son before

(*b*) See this Caſe cited ante, in *Kentiſh* verſus *Newman*, 235.

fore the Iſſue of his eldeſt. And the Conſtruction contended for in the preſent Caſe would be equally unreaſonable.

Caſe 119.

Lord Chancellor Parker.

Where a Bill wants proper Parties, it is in the Power of the Court to diſmiſs the Bill *ſans* Prejudice, or to give Leave to amend, paying Coſts.

Stafford verſus *City of London.*

A. And *B.* bring a Bill to be relieved againſt the City of *London*, in Regard *A. B.* and *C.* (who in the Bill was mentioned to be dead) were joint Leſſees from the City of divers Water-Springs near *London*, at the Rent of 700 *l. per Annum*. And the Plaintiffs Bill was to have ſeveral Allowances out of the ſaid Rent, by Reaſon, that the Leſſees were evicted as to ſome, and diſturbed in the Enjoyment of others of the ſaid Waters, by the City themſelves and by others.

The City anſwers the Bill, and pending the Suit, brings an Action of Debt againſt *A.* and *B.* for the Rent, ſuppoſing *C.* to be dead; and to this Action *A.* and *B.* plead in Abatement, that *C.* was living, and ought to be made a Defendant to the Action; which being a Plea in Abatement, *A.* and *B.* made an Affidavit of the Truth of the Fact.

And this Cauſe now coming on, the Defendants inſiſted upon want of proper Parties, (*viz.*) that *C.* was living, and not a Party to the Bill, and that *C.* was a neceſſary Party, as he was a joint Leſſee, and equally concerned with *A.* and *B.* and if the Allowances made to *A.* and *B.* were not ſatisfactory to *C.* he might draw the Account all over again; that *C.* could not be bound by the Account, unleſs made a Party, and bringing him before the Maſter would not be enough, where it appeared he was eſſentially and equally concerned with any of the other Plaintiffs. *Quod Curia conceſſit.*

Then the Queſtion was, whether the Court ſhould give the Plaintiffs Leave to amend, paying the Coſts of the Day, or diſmiſs the Bill?

Cur': This is a very Trick to ſuppoſe *C.* dead by the Bill, when the Plaintiffs (perhaps) could not get him to join, and yet to ſwear him living, upon the Plea in Abatement; and it being diſcretionary in the Court, either to diſmiſs the Bill, or to give Leave for an Amendment on Payment of the Coſts of the Day, if in any Caſe a Bill ought to be diſmiſſed, let it be in this; but without Prejudice to another Bill.

Freemoult verſus *Dedire, & econtra.*

Caſe 120. *Lord Chancellor* Parker. One covenants before Marriage to ſettle certain Lands on his Wife for Life, and afterwards deviſes theſe Lands for Payment of Debts, the Covenant is a Specific Lien on the Lands. But a Covenant to ſettle Lands of the Value of 60 *l. per Annum*, without mentioning any Lands in certain, this no Specific Lien, but the Wife muſt come in as a Creditor in general, and the Maſter to value her Eſtate for Life, and the Wife to come in for that Valuation. But the Wife to have the Arrears before incurred, as well as the Valuation of her Eſtate for Life.

THere were ſeveral Demands of ſeveral Natures affecting the Eſtate of the Teſtator *Abraham Dedire*; he owed Debts by Bond and by Simple Contract, and upon his Marriage had covenanted to ſettle his Lands in *Rumney* Marſh, and alſo Lands that ſhould be of the Value of 60 *l. per Annum*, upon his Wife for her Life; after which he makes a Will, thereby charging all his Eſtate Real and Perſonal with the Payments of his Debts, and dies, leaving his eldeſt Son Executor.

On a Bill brought by the Creditors for the Satiſfaction of their ſeveral Debts, *Lord Chancellor* ſaid, with Regard to the Lands in *Rumney* Marſh, the Marriage Articles, being a Specific Lien upon them, make the Covenantor, as to them, but a Truſtee, and therefore, during the Life of the Wife, they are not to be affected by any of the Bond Debts.

But the Covenant for ſettling Lands of the Value of 60 *l. per Annum* on the Wife for her Life, does not ſpecifically bind any Lands; wherefore, as touching that, the Wife muſt come in only as a Specialty Creditor with the other Specialty Creditors. And in order to ſettle the *Quantum* of this Demand, let the Maſter ſet an Eſtimate on the Wife's Eſtate for Life, (*viz.*) at ſo many Years Purchaſe, and then the Wife to come in as a Creditor by Specialty, for ſo much Money. But in Regard the 60 *l. per Annum* was in Arrear for two Years at the Time of the Hearing of this Cauſe, ſhe muſt come in as a Creditor for 120 *l.* for theſe two Years Arrears, beſides the Value of her Eſtate for Life.

And though it was objected, that the Maſter ought to value what her Life-Eſtate was worth at the Time of her Huſband's Death, yet the Court over-ruled this; for theſe two Years Arrears were a Debt actually due to her, and muſt in all Events be paid, and ſhe ran the hazard of a Fall of her Life in the mean Time, and if her Life had dropped, there muſt have been no Valuation; and ſo it was ſaid to have been ruled on Debate in one *Beriſford*'s Caſe, in Lord *Harcourt*'s Time.

Alſo it being ſubmitted to the Court, that foraſmuch as in this Caſe the Lands were not deviſed to be ſold for the Payment of Debts, but permitted to deſcend charged with the Debts, and conſequently were legal Aſſets by Deſcent as to the Bond Creditors, and charged only in Equity by the Will as to Simple Contracts, whether the Bond Creditors ſhould not be preferred to thoſe by Simple Contract?

One deviſes his Lands for Payment of his Debts; Bonds and Simple-Contract Debts ſhall be paid equally. But if he only charges his Lands with the Payment of his Debts, ſo that the Lands deſcend ſubject to the Debts, the Bonds ſhall be preferred before the Simple-Contract Debts.

By *Lord Chancellor:* As this Caſe is they ſhall: But if the Heir before any Action brought had ſold the Lands, and then the Creditors by Bond had brought their Actions, they ſhould have been paid only their Share out of the Aſſets. And it is obſervable, that by the expreſs Words of the Statute of 3 *&* 4 *W. & M. cap.* 14. " where there is any Deviſe or Appoint-" ment by a Will of Lands for Payment of Debts, or " Childrens Portions according to an Agreement be-" fore Marriage, other than the Heir at Law, ſuch " Will ſhall be of Force."

But if the Heir ſells the Land before the Action brought, then both to be paid equally.

By the Statute of Fraudulent Deviſes, a Will for Payment of Debts, or younger Childrens Portions according to an Agreement before Marriage, ſhall be good.

Then it was contended, that theſe Marriage Articles were made in *Holland*, and that by the Law of *Holland*, ſuch Articles take Place of any other Debts, wherefore they ſhould be here conſtrued according to the Law of *Holland*, where they appeared to have been made; which was ſaid to have been held in the Caſe of (*a*) *Feaubert* and *Turſt*.

(*a*) Preced. in Chanc. 207.

To which it was anſwered, and ſo ruled, that it ought to have been proved in this Cauſe what is the Law of *Holland*, as in the Cauſe of *Feaubert* and *Turſt* it was proved what was the Law of *France*, without which Proofs our Courts cannot take Notice of foreign Laws.

Laws and Cuſtoms of *France* or *Holland* muſt be proved, elſe the Court cannot take Notice of them.

Caſe 121.
Lord Chancellor Parker.
Abridgment of Caſes in Equity 193.
Termor deviſes the Term to *A.* for Life, Remainder to ſuch of his Iſſue as he ſhall appoint, and if *A.* die without Iſſue, Remainder to *B.* this a good Deviſe, to *B.*

Target & al' verſus *Gaunt & al'.*

ONE poſſeſſed of a Term for Years deviſed it by his Will to his Son *Henry* * *for his Life, and no longer, and after his Deceaſe, to ſuch of the Iſſue of the ſaid* Henry, *as* Henry *by his Will ſhould appoint*; and in Caſe *Henry* ſhould die without Iſſue, then the Teſtator deviſed the ſame to his Brother *Albinus* for the Reſidue of the Term, and died.

Henry died without Iſſue living at his Death; whereupon

The Queſtion was, whether the Term ſhould go to the Executors of the firſt Teſtator, or to the Executors of *Henry*, or to *Albinus*?

Object. The Deviſe over of a Term upon a Death without Iſſue, is void, being too remote an Expectancy, and tending to a Perpetuity.

Lord Parker: The Expreſſion of dying without Iſſue, has two Senſes: (*a*)

1*ſt*, A vulgar Senſe, and that is, dying without leaving Iſſue at the Time of his Death.

(*a*) Vide ante in *Nichols* verſus *Hooper*, 199. poſt *Pinbury* verſus *Elkin*, 564, 565. & *Forth* verſus *Chapman*, 666.

* Note; The Words which are in *Italic*, are all omitted in the Regiſter Book, though they are inſerted in all the Cotemporary Reports of this Caſe, and ſeem here to be the principal Foundation of the Decree.

2*dly*, A legal Senſe, and that is, whenever there is a Failure of Iſſue.

And if this Will be taken in a vulgar Senſe, (*viz.*) if *Henry* dies without leaving Iſſue at the Time of his Death, then the Deviſe over to *Albinus* is good; now this ſeems to be the Meaning of the Teſtator in the Principal Caſe; for it muſt be intended *ſuch Iſſue* as he ſhould, or at leaſt might appoint the Term to, which muſt be intended *Iſſue then living*; and this Conſtruction ſhall be the more favoured, in regard it ſupports the Will, whereas the other deſtroys it.

Therefore the Court held, that the Deviſe over of the Term to *Albinus* was good, and obſerved, that there was a great Diverſity betwixt a Deviſe of a Freehold Eſtate for Life, and if *A.* dies without Iſſue, then to *B.* and a Deviſe of a Term in the ſame Words; for in the former Caſe this might give *A.* an Eſtate-Tail, becauſe the Words [if *A.* die without Iſſue] in Caſe of an Inheritance, are inſerted in Favour of the (*a*) Iſſue, and to let in the Iſſue after the Death of the Father; but in Caſe of a Term, theſe Words cannot have ſuch Effect, for the Father takes the whole, which, on his Death, will not go to his Iſſue, but will belong to his Executors.

(*a*) Vide poſt in the Caſe of *Forth* verſus *Chapman*, 667.

Alſo *Lord Chancellor* cited the Caſe of *Lodington* and *Chime*, reported in 3 *Lev.* 431. which his Lordſhip ſaid was in ſome Points of it ill, and miſtakenly reported by Serjeant *Levinz*, though he himſelf was of Counſel in it, and that this was a ſtronger Caſe than the Principal.

Note; Mr. *Mead* urged that if *Henry* ſhould have Iſſue at his Death, and ſhould make no Appointment to ſuch Iſſue, the Deviſe over to *Albinus* would be good. But the Court ſaid nothing as to this.

Caſe 122.
At the Rolls.

Richardſon verſus *Spraag*.

Deviſe of a Truſt to all his Daughters or their Children living at the Teſtator's Son's Death; ſome of the Daughters were living at the Son's Death, and had Children, and others of the Daughters were dead leaving Children; decreed all the Children, as well of the living Daughters as of the Dead ſhould take.

TEſtatrix deviſed Money in Truſt for ſuch of her Daughters, *or* Daughter's Children, as ſhould be living at her Son's Death. Some of the Daughters were living at the Son's Death, and had alſo Children, and others were dead leaving Children.

Upon which the Queſtion was, whether the Children of the living Daughters ſhould be let into a Share under this Deviſe, or only the Children of the Dead Daughters as ſubſtituted in the Place of their Mothers?

This came on before Sir *Joſeph Jekyll Maſter of the Rolls*, who, after having taken Time to conſider of it, decreed, that all the Children, as well of the living, as of the dead Daughters, ſhould come in for their Shares

The Word [*or*] to be taken for [*and*].

For that the Word [*or*] ſhould be taken (*a*) for [*and*] otherwiſe the whole Deviſe would be void for the Incertainty; and that it was the ſame, as if the Deviſe had been to ſuch of my Daughters, *and* their Children, as ſhall be living at my Son's Death; ſo if the Deviſe had been to my Children *or* Grandchildren, my Children *and* Grandchildren would have taken.

Moreover the Word [*or*] might be of Uſe, in regard all the Daughters might die in the Son's Life-Time, and then the Teſtatrix might not think it proper to ſay, Daughters *and* their Children, when there might not be ſome of each Species; but [*or*] in ſuch Caſe would be the proper Word, and that the Word [*or*] is uſually put for [*and*] appeared by very many Inſtances in the

(*a*) Vide poſt Vol. 2. *Keylway* verſus *Keylway*, 346, alſo 2 Vern. 388, 389.

Caſe of *Price* verſus *Hunt* in *Pollexfen's Reports* 645. the laſt Caſe but one in the Book *.

Rex verſus *Burrard*.

Caſe 123.

Motion to ſuperſede a Writ of *Excommunicato capiendo*, 1ſt, for want of Addition; and 2*dly*, becauſe not ſaid the Defendant was commorant in the Dioceſe. Court diſallowed both the Exceptions, but inclined to think that after the Writ has been iſſued out of this Court, and been brought into *B. R.* and there delivered to the Sheriff, but not yet actually returned into *B. R.* this Court, on a plain Error appearing, may ſuperſede or quaſh it.

THE Defendant was excommunicated for not paying his Proportion of a Rate made for repairing the Church of *D.* in *Suffolk*.

And it was moved by Sir *Edward Northey*, *Attorney General*, to ſuperſede this Writ, 1*ſt*, for that it was not ſhewn, that the Defendant was commorant within the Dioceſe at the Time of the Excommunication pronounced. *Moor* 467. *T. Jones* 89.

2*dly*, Becauſe there was no Addition of the Defendant in the Writ.

On the other Side it was anſwered (as to the firſt Objection) that the Defendant in the Libel was ſaid to be of *D.* in *Suffolk*, which was the ſame Pariſh where the Church was, and it ſhould not be intended that, after the Libel, he removed from thence; but if he did remove, his flying from the Proceſs of the Court which had a proper Juriſdiction, ſhould not mend his Caſe, for then the Party, by his own Act, and by his turning his Back upon Juſtice, might avoid ſuch Proceedings.

2*dly*, As to the Want of an Addition, this was ſaid to be only requiſite in the Cauſes of Excommunication mentioned in the Statute of the 5th *Eliz. chap.* 23. for which Reaſon, it was true, that for want of an Addition there could be no Proceeding againſt him, by way of Proclamations with Pains and Penalties for not appearing,

---

* It ſeems as if it might have been agreeable to the Senſe of the Teſtatrix to have underſtood the Deviſe thus: "To my Daughters, and to "the Children of ſuch of them as ſhall be dead, &c.

pearing, but ſtill, as the Matter was plainly of Eccleſiaſtical Cognizance, (*viz.*) the Repairing of a Church, the Excommunication was good, and ſo was *Cro. Car.* 196. *Hughe*'s Caſe, *T. Jones* 89. The Inhabitants of *Berdmondſey*, Sir *Bartholomew Shower*'s Reports 16. *Johnſon's* Caſe, *Salk.* 293. *The King* verſus *Fowler*.

Lord Chancellor called for the Writ; and it appearing by the Indorſement thereon, that this Writ iſſued out of Chancery, and, according to the Statute of the 5th *Eliz.* was returnable in the King's Bench, and, though not yet actually returned, had been brought into the King's Bench, and by that Court delivered to the Sheriff, for this Reaſon Lord Chancellor doubted, whether, though the Writ were not returned, yet foraſmuch as the Court of King's Bench was poſſeſſed of it, the Chancery could ſuperſede this Writ; and at firſt his Lordſhip inclined, that it could not, but afterwards ſeemed to alter his Opinion, and this, in regard of the great Miſchief which might follow, if the Writ of *Excommunicato capiendo* ſhould iſſue out in the long Vacation, when the King's Bench does not ſit; and it would be hard that there ſhould be a Failure of Juſtice, and the Party continue in Priſon, and without Remedy, as he would do, if, in ſuch Caſe, the Chancery could not, on a plain Error, ſuperſede or quaſh the Writ, which he therefore the rather inclined (*a*) might be done before the return of it. However, his Lordſhip would declare no Opinion upon this; but the other Exceptions againſt the Writ being diſallowed, the Order, which was made for ſuperſeding the Writ *niſi*, was diſcharged.

(*a*) And this in Fact was done in *Trin. Term.* 1727. by Lord *King* in the Caſe of *Barlow* verſus *Collins*, where the Writ of *Excom. cap.* was for not paying Coſts in a Cauſe in the Spiritual Court for Non-payment of Tithes and *other Eccleſiaſtical Duties*, which being ill for Uncertainty, though the Writ was inrolled in *B. R.* yet being not returned there, to prevent a Failure of Juſtice, it was ſuperſeded in Chancery. But *Quære*, Whether the Words above *in the long Vacation* ſhould not have been *a little before the long Vacation*, for the Statute of the 5th *Eliz. ſect.* 2. expreſly ſays, that every Writ of *Excom. cap.* ſhall be made out in *Term-Time*.

DE

Term. S. Trinitatis,

1718.

Price verſus *The Hundred of Chewton in Com. Somerſet.*

Caſe 124.
Lord Chancellor Parker.

Instructions for an Original againſt an Hundred for a Robbery were brought to the Curſitor within the Year, but the Writ paſſed the Great Seal after the Year, though teſted within the Year, (*viz.*) when the Instructions were brought to the Curſitor: This held good, being warranted by the Practice of the Curſitors Office.

THE Plaintiff *Price*, on the 10th of *June* 1717, went before a Juſtice of the Peace, and ſwore he was robbed that Day about two of the Clock at Noon, of 180 *l.* and on the 9th of *Auguſt* following ſued out an Original againſt the Hundred, who appearing, the Plaintiff declared upon the Statute of *Winton*, after which he dropped the Action, and afterwards, on the 10th of this Inſtant *June*, ſued out a new Original, but the ſame was antedated, and made to bear *Teſte* the 5th of *June* Inſtant; and the Defendants produced a Certificate from the Curſitor, that the Writ was not ſealed until the 10th Inſtant. Wherefore, as there could not be two Tenths of *June* in the ſame Year, they inſiſted the Year was elapſed, and conſequently, that the Right of Action was extinct by ſuch Lapſe of Time, and the Hundred actually diſcharged; that it ought not to be in the Power of the Curſitor, by his antedating the Writ, to revive the Action, or to give a Right to the Plaintiff, which he was before legally debarred of;

for which Reaſon, it was prayed, that the Original might be ſet aſide and ſuperſeded. But

On the other Side it was anſwered, that the Original was made to bear *Teſte* on the Day that the Inſtructions were brought to the Curſitor, which was on the 5th of *June* inſtant, though it had not been actually ſealed until the 10th; and that it was the conſtant Courſe, to make the Writ bear *Teſte* when the ſame was beſpoke; that if it were otherwiſe, it might be an Inconvenience and Hardſhip to the Suitor, who might ſuffer and be deprived of his Right, for what he could not help; for that it was frequently impoſſible to get the Writ ſealed for a conſiderable Time after ſuch Writ was beſpoke, and even drawn up by the Curſitor.

Lord Chancellor: Let this be referred to the Principals and Aſſiſtants of the Curſitors Office, to certify what has been the Uſage and Cuſtom in theſe Caſes, and to ſearch Precedents in Relation thereto, and in the mean Time, let all Proceedings ſtay.

(*a*) 18 *July* following.

In Obedience to this Order, the Principals and Aſſiſtants of the Society of Curſitors, ſoon after (*a*) made their Certificate, and thereby certified it to be the conſtant Practice of their Office, "to *Teſte* Original Writs "againſt Hundreds, Corporations, Heirs, and in ſeveral "other Caſes, the ſame Day the Writs are beſpoke, and "that they never knew it otherwiſe, or that the "Practice was ever conteſted before the preſent Caſe."

Upon which it was ordered, that the ſaid Plaintiff might be at Liberty to proceed in this Hue and Cry, and that the Defendants ſhould pay the Coſts in Reſpect of the ſaid Reference.

Pain's Caſe. *B. R.*

Caſe 125.

Eſcape Warrant. One committed in Equity for a Contempt in reſcuing another taken on Lord Chancellor's Warrant, ſuch Perſon not liable to an Eſcape Warrant.

PAIN was committed to the *Fleet* by the late *Lord Chancellor Cowper* for a Contempt in obſtructing the Execution of his Lordſhip's Warrant for the Commitment of *Pain*'s Father, for the Non-Payment of a Debt decreed to the Plaintiff *Hinchliffe*, and *Pain* having removed himſelf to the King's Bench, and being let at large by the Marſhal, *Lord Chief Juſtice Pratt* granted his Eſcape Warrant againſt him, upon which *Pain* was taken in the *Strand*, and committed to *Newgate* as the County Gaol.

And it being thought by *Pain*'s Counſel, that an Eſcape Warrant would not lie in this Caſe, it was moved that the Warrant might be returned; which being granted,

The Priſoner now moved to be diſcharged, inſiſting that an Eſcape Warrant did not lie, in regard the Statute of the (*a*) firſt of Queen *Anne*, *cap.* 6. which gives the Eſcape Warrant, ſpeaks only of Perſons committed by any of the Courts of Record at *Weſtminſter*, upon any Action of Debt or Damages, or *for a Contempt in not performing Orders or Decrees made in Courts of Equity*; ſo that the Statute does not extend to Perſons committed for Contempts generally, but it muſt be for a "Contempt for not performing an Order or Decree". *Exceptio probat regulam*, and the Statute mentioning this Contempt, excludes all others; now *Pain*, though committed for a Contempt, yet was not committed for a Contempt in not performing any Order or Decree, there being no Order or Decree againſt *Pain*.

(*a*) Vide etiam 5 *Annæ*, *cap.* 9.

Indeed if *Pain*'s Father had been committed, and had eſcaped, there being an Order againſt him for Payment of Money, an Eſcape Warrant would have lain againſt *him*; but *Pain* the Son was not within the Act, he not being to perform any Order or Decree, and, when committed, was only to ſuffer, and not to perform any Thing.

That this Statute being a penal Law, whereby the Party was to be impriſoned without Bail or Mainpriſe, was to be taken ſtrictly, and not to be enlarged by Equity; and the Intent of it was, to preſerve the Property of the Subject, not to puniſh mere Contempts.

Accordingly, and for theſe Reaſons, it was adjudged by all the Judges of the King's Bench, *ſeriatim*, that this Warrant did not lye.

But there being an Order of Chancery, that *Pain* the Priſoner ſhould be kept within the Walls of the *Fleet*, and he now eſcaping out of the Gaol of the Court of King's Bench, the Court made a Rule, that *Pain* ſhould be delivered by the Keepers of *Newgate* to the Marſhal of the King's Bench, to be there kept in cloſe Confinement, according to the Intention of the Order in Chancery, whereby he was confined within the Walls of the *Fleet*.

Lawſon verſus *Lawſon*.

Caſe 126.

THE Teſtator being languiſhing upon his Death-Bed, delivered to his Wife a Purſe of Gold containing about 100 Guineas, and bid her *apply it to no other Uſe but her own*, and likewiſe drew a Bill upon a Goldſmith to pay 100*l.* to his Wife, *to buy her Mourning* and to maintain her until her Life-Rent (meaning her Jointure) ſhould become due, and ſoon afterwards (*viz.* about ſeventeen Days after the drawing of the Bill) the Teſtator died.

Donatio causâ Mortis.

Huſband upon his Death-Bed delivers to his Wife a Purſe of 100 Guineas, and bids her apply it to her own Uſe. This is *Donatio causâ Mortis*, and a good Legacy to the Wife, and ſhall not go to the Executors or Adminiſtrators of the Huſband, if there is ſufficient to pay Debts. So likewiſe, if the Huſband being ill (*ut ſupra*) draws a Bill on his Goldſmith to pay his Wife 100*l.* for Mourning, this is a good Appointment. More doubtful, if the Money on the Bill were received in the Huſband's Life-Time.

This coming on upon the Maſter's Report, the *Maſter of the Rolls* was clearly of Opinion, that as to the Purſe of Gold, it was *Donatio causâ Mortis*, in regard the Teſtator was then languiſhing upon his Death-Bed; and therefore, it being in nature of a Legacy, and not to take Effect, but in Caſe of the Donor's Death, under ſuch Circumſtances, a Man might give to his Wife; and it was the ſtronger, it being ſaid, that ſhe was to apply it to no other Uſe but her own; for conſequently ſhe was not to apply it to her Huſband's Uſe.

His Honour further obſerved, that this being *Donatio causâ Mortis*, need not be proved with the Teſtator's Will, neither need any ſuch Gift, tho' in Nature of a Legacy, be ſo proved; for they operate as a Declaration of Truſt upon the Executor.

As to the other Point, the Court at firſt held, that the Teſtator's ordering the Goldſmith to pay 100 *l.* to his Wife was but an Authority, and determined by the Teſtator's Death.

To which Mr. *Vernon* replied, that this was an Authority coupled with an Intereſt, and being given for Mourning, it could not take Effect but upon the Teſtator's Death, and therefore his Death could not be a Revocation; which ſeemed to have weight; but his Honour doubted, whether there could be a *Donatio causâ Mortis* without an actual Delivery to ſuch Donee; at leaſt, it was a Point not ſettled, for which Reaſon, he would (he ſaid) reſerve it for further Conſideration.

Afterwards in *Hillary Vacation*, 1718. the *Maſter of the Rolls* delivered his Opinion ſolemnly on both theſe Points:

That the Delivery of the Purſe was good; and muſt operate as a *Donatio causâ Mortis, ut Res magis valeat, &c.* Becauſe otherwiſe one could not give to his own Wife, and there being a Delivery by the Teſtator in his laſt Sickneſs, and when he was ſo near his End, and the bidding his Wife apply it to no other Uſe than her own, made this Part of the Caſe plain; and he cited *Swinburne* 18. where it appears there are three Sorts of Gifts *Causâ Mortis*, and ſaid this was in the Nature of a Legacy to the Wife.

2dly, As to the Bill of 100 *l.* drawn upon his Goldſmith payable to his Wife to buy her Mourning, and to maintain her until her Life-Rent (*viz.* Jointure) ſhould come in:

This his Honour held good, and to operate as an Appointment; that if the Wife had received it during the Huſband's Life-Time, it would have been liable to ſome Diſpute, but that he apprehended this amounted to a Direction to his Executors, that the 100 *l.* ſhould be appropriated to his Wife's Uſe. And he inclined to think, that even if the Wife had received it in the Huſband's Life-Time, ſhe ſhould have kept it; that being for Mourning, it might operate like a Direction given by the Teſtator touching his Funeral, which ought to be obſerved, though not in the Will; that the Court ought to go as far as it could, to aſſiſt the Meaning of the Party in this Caſe; here was a Wife attending her Huſband in his laſt Sickneſs, and the Huſband ſenſible of her Affections, was conferring Gifts upon her, and thoſe not extravagant (for then he admitted Equity ought not to make them good) but the Gifts were but 200 *l.* whereas the Perſonal Eſtate amounted to 8000 *l.* ſo that this was only an Inſtance of the tender Care of an affectionate Huſband towards his Wife; wherefore it was decreed accordingly.

Drake verſus *Robinſon*.

Caſe 127.

MR. *William Berners* of *Hadham* in *Hertfordſhire*, having made a Settlement of a Real Eſtate upon his Wife for her Jointure, and having contracted ſeveral Debts, made his Will, and thereby deviſed *all his Real Eſtate*, not comprized in the Settlement, to Truſtees and their Heirs for the Payment of his Debts, and was ſeiſed of ſeveral Freehold and Copyhold Lands, but had

One deviſes all his Real Eſtate to pay Debts, and having Part Freehold and Part Copyhold, and dies without having ſurrendered the Copyhold to the Uſe of his Will; regularly the Copyhold ſhall not paſs without being mentioned, and if mentioned, Equity will on behalf of Creditors ſupply the Want of a Surrender. But if the Freehold Eſtate be not ſufficient to pay the Debts, the Copyhold being Real Eſtate ſhall be liable.

had not ſurrendered his Copyhold Lands to the Uſe of his Will, and died leaving three Sons, and Part of the Copyhold was of the Nature of *Borough Engliſh.*

Objected, The Copyhold does not paſs by this Deviſe, for though, in the Caſe of Creditors, Equity will ſupply the Want of a Surrender, yet the Copyhold ought ever to be mentioned in the Will, eſpecially where (as in the preſent Caſe) there is a Freehold Eſtate that will ſatisfy the Words of the Will.

Lord Chancellor: If the Copyhold paſſes, the youngeſt Son, who is intitled to ſuch Part thereof as is *Borough Engliſh*, muſt contribute to pay his Proportion of the Debts. As betwixt the Sons, it is a doubtful Caſe; but with Regard to the Creditors, if there be not an Eſtate ſufficient for the Payment of the Debts without the Copyhold Lands, my Opinion is, theſe ought to paſs.

The Man is not a juſt Man unleſs he takes Care to pay his Debts; for which Reaſon he has made choice of Words large enough for that Purpoſe, a Copyhold Eſtate being a Real Eſtate.

And ſince the Teſtator's firſt Intention is to be honeſt, and pay his Debts, to cramp ſuch his Deſign by a narrow Conſtruction, ſeems like being acceſſary to the making ſuch Teſtator a Knave even againſt his Will.

But let the Maſter firſt ſee whether there be enough without the Copyhold for the Payment of the Debts.

Balch verſus *Waſtall.*

Caſe 128.

Lord Chancellor Parker.

A. having outlawed *B.* brings a Bill againſt *B.* and *C.* a Truſtee for *B.* with Reſpect to an Annuity, to ſubject this Annuity to the Plaintiff's Debt. The *Attorney General* ought to be made Party, and the Plaintiff muſt get a Leaſe or Grant in the Court of Exchequer from the Crown.

THE Defendant owed Money to the Plaintiff by Bond, and the Plaintiff having outlawed the Defendant before Judgment, brought his Bill in this Court againſt the Defendant, and one that was a Truſtee for the Defendant, as to an Annuity of 20 *l. per Annum* deviſed to the Defendant out of a Perſonal Eſtate, in order to ſubject this Annuity to the Plaintiff's Debt.

On its being objected, that this Bill did not lye, all the Defendant's Eſtate being forfeited to the Crown, Mr. *Vernon* inſiſted, that ſince the Plaintiff had gone as far as he could at Law, and was hindered by the Contempt of the Defendant, and this being a Matter of Truſt, and a Creature of Equity, the Plaintiff ought rather to be relieved here, than ſent to another Court: *Fruſtra fit per plura, quod fieri poteſt per Pauciora*; and he cited a Caſe where Lord *Nottingham* had held, that one who had a Judgment, and had lodged a *Fieri Facias* in the Sheriff's Hands, to which *Nulla bona* was returned, might afterwards bring a Bill againſt the Defendant, or any other, to diſcover any of the Goods or Perſonal Eſtate of the Defendant, and by that Means to affect the ſame; but he muſt firſt go as far as he can at Law, by delivering this Writ of *Fieri Facias*, and getting it returned.

And to this the Court at firſt inclined; but afterwards were of another Opinion; foraſmuch as by the Outlawry all the Defendant's Intereſt, as well Equitable as Legal, was forfeited to the Crown; and though the

Plaintiff was intitled to a Grant thereof from the Crown, which, upon Application to the Court of Exchequer, he would of Courſe have, yet, ſince this Truſt continued in the Crown until taken out, they directed the Plaintiff to get ſuch Grant, and make the Attorney General a Party, and then to come again.

And agreeable hereto, afterwards in *Eaſter Term* 1721. in the Caſe of *Hayward* verſus *Fry*, where *J. S.* owed the Plaintiff 100 *l.* and the Defendant *Fry* owed *J. S.* 100 *l.* on Note, and the Plaintiff *Hayward* outlawed *J. S.* and brought a Bill againſt *J. S.* and *Fry* to have this 100 *l.* paid him, the Maſter of the Rolls declared the Plaintiff could have no Title but by Grant under the Exchequer Seal, all the Perſonal Eſtate of *J. S.* being veſted in the Crown by the Outlawry, and put off the Cauſe in order that the Plaintiff might get ſuch Grant, and make the Attorney General a Party.

Caſe 129.

Lord Chancellor Parker.

Earl of Clarendon and *Mr. Bligh and his Wife* verſus *Hornby*.

On a Partition in Chancery, every Part of the Eſtate need not be divided; but ſufficient if each Tenant in common, &c. have an equal Share of the whole.

A Partition was decreed of the Eſtate late Sir *Joſeph Williamſon*'s, two Thirds whereof belonged to Lady *Theodoſia Bligh*, and one Third to the Defendant *Hornby*; the Eſtate conſiſted (among other Things) of a great Houſe called *Cobham* Houſe, and *Cobham* Park in *Kent*, and of Farms and Lands about it of 1000 *l.* *per Annum*.

The Defendant *Hornby* inſiſted to have a Third of the Houſe, and alſo a Third of the Park aſſigned to him by the Commiſſioners who were to make the Partition.

And this Matter coming on before the *Lord Chancellor* upon a Petition, it was urged on behalf of Mr. *Hornby*, that as he was intitled to a Third of the Whole, ſo conſequently he was to have a Third of the Houſe and Park; and in many Caſes in the Law, Things intire in their Nature, as an Houſe, a Mill, or an Advowſon, might be divided; ſo a Tenant in common ſhall have Half the Houſe, every other Toll-Diſh, and every other Turn of a Church, *&c.* that thus it would be *at Law*, in Caſe of a Writ *de partitione faciendâ*; and in this Caſe *Æquitas ſequitur Legem.*

Lord Chancellor: Care muſt be taken, that the Defendant *Hornby* ſhall have a third Part in Value of this Eſtate; but there is no Colour of Reaſon, that any Part of the Eſtate ſhould be leſſened in Value, in order that the Defendant *Hornby* ſhould have one Third of it; now if Mr. *Hornby* ſhould have one Third of the Houſe, and of the Park, this would very much leſſen the Value of both.

If there were three Houſe of different Value to de divided amongſt three, it would not be right to divide every Houſe, for that would be to ſpoil every Houſe; but ſome Recompence is to be made, either by a Sum of Money, or Rent for Owelty of Partition, to thoſe that have the Houſes of leſs Value.

It is true, if there were but one Houſe, or Mill, or Advowſon to be divided, then this intire Thing muſt be divided in manner as the other Side contend; *ſecus* when there are other Lands, which may make up the Defendant's Share.

By the ſame Reaſon, every Farm-Houſe upon the Eſtate muſt be divided, which would depreciate the Eſtate, and occaſion perpetual Contention; and it may be the Intent of the Defendant, when this Partition is made, to compel the Plaintiff to give the Defendant forty Years Purchaſe for his Third of the Houſe and Park.

Therefore ſince the Plaintiff *Bligh* and his Wife have two Thirds, I recommend it that the Seat and Park be allowed to them, and that a liberal Allowance out of the reſt of the Eſtate be made to the Defendant, in Lieu of his Share of the Houſe and Park.

Caſe 130.

Butler & Anne Ux' verſus *Duncomb*.

Lord Chancellor Parker.

2 Vern. 760.

Term created for Daughters Portions commencing after the Death of the Father and Mother, upon Truſt to raiſe the Portions from and after the Commencement of the Term. Father dies leaving a Daughter. Decreed the Portion is veſted, but not raiſeable during the Life of the Mother.

UPON the Marriage of *George Duncomb* with *Mary*, one of the Daughters of the late Lord C. J. *Pollexfen*, the Defendant *George Duncomb* the Father covenanted to ſettle Lands in the Articles mentioned (being 400 *l.* a Year) on *George Duncomb* the Son for Life, Remainder to *Mary* his intended Wife for Life, Remainder to the firſt and every other Son of the Marriage in Tail Male, Remainder to Truſtees for five hundred Years, upon the Truſt therein mentioned, Remainder to the Uſe of the Defendant *George Duncomb* in Fee.

The Truſt of the five hundred Years Term was declared to be, that the Truſtees ſhould, *from and after the Commencement of the Term*, raiſe Portions for the younger Children of the Marriage, *viz.* if but one younger Child, then 3000 *l.* if more, 4000 *l.* to be raiſed by the Rents and Profits, or by Sale, Demiſe, or Mortgage, *and payable at twenty-one or Marriage.*

The Marriage took Effect, and there was Iſſue a Daughter only (the Plaintiff *Anne*) and *George* the Huſband died.

Afterwards, purſuant to the Articles and a Decree in this Court, the Defendant *George Duncomb* ſettles the ſame Premiſſes (being 400 *l. per Annum*) on his Daughter-in-Law *Mary* for Life, Remainder to Truſtees for 500 Years, the Reverſion to the Defendant *George Duncomb* himſelf in Fee.

The Truſt of the five hundred Years Term is, (as before) that the Truſtees ſhould, *from and after the Commencement of the Term*, by Rents or Profits, Sale, Demiſe, or Mortgage, raiſe 3000 *l.* to be paid to the Plaintiff *Anne* at her Age of twenty-one or Marriage; but there is no Proviſion for Maintenance.

The Plaintiff *John Butler*, who was but a Mercer in *Guilford*, and of mean Circumſtances, by Stealth and Bribery prevails with the Plaintiff *Anne* (when but fifteen, and without the Conſent of any of her Relations) to marry him, and with her brings this Bill for the Portion.

It was urged for the Plaintiff, that, though the Man had been in Fault, yet this was now as the Wife's Suit for her Portion, in which the Huſband joined but for Conformity; and therefore his indirect Practices in procuring the Marriage were out of the Caſe. *Quod Cur' conceſſit.*

Next it was inſiſted, that the 500 Years Term was veſted in the Truſtees, preſently, on Sealing the

Deed; and was aſſignable and ſaleable; and that a Proviſion for a Portion was to be favoured; ſo that if it could be any ways conſiſtent with the Deed, it ſhould be paid at ſuch Time as there was Occaſion for it, and not wait until the Death of the Parent the Mother, who being now but forty-three Years of Age, the Daughter might, at that Rate, be ſixty Years of Age, before her Portion would be payable.

That though the Words were, that the Truſtees *from and after the Commencement of the Term* ſhould raiſe the Portion, yet (it was ſaid) there was a legal, (*a*) and an equitable Commencement of the Term; it was plain there was an Eſtate of the Term ſubſiſting, by which the Portion could be raiſed, and Equity would call for it, when there was moſt Occaſion, which was upon the Daughter's Marriage; and when the Payment by expreſs Words was appointed to be at the Daughter's Age of twenty-one or Marriage, the other Words inconſiſtent with theſe, ſhould be rejected as repugnant; that whenever it ſhould be raiſed, it muſt carry Intereſt from the Marriage, it being appointed to be then paid; and therefore to raiſe it now would be moſt beneficial to the Daughter, and not prejudicial to the Reverſioner, who in all Events was to pay Intereſt, either to the Daughter, or to the Mortgagee, and it could not be material to which.

(*a*) Poſt 456.

That it muſt the rather have this Conſtruction, in Regard, in this Caſe, there was no Maintenance provided for the Daughter, until her Portion became payable.

Beſides, the Perſon here contended with, was only the Father, who had the Reverſion in Fee, and had received the 4000 *l.* which was the Mother's Portion; and yet now made a Difficulty of parting with 3000 *l.*

That though the Settlement in this Caſe was after the Marriage, yet the Plaintiffs grounded their Pretenſions upon the Articles made before Marriage; and notwithſtanding it might be objected, that the Plaintiff the Daughter *Anne* was not a younger Child within the Truſt of that Term, yet as a Daughter, though firſt born, when there was a Son born after, was, in Equity, deemed to be a (*a*) younger Child, ſo here ſhe ſhould be conſidered in the ſame Light, for that otherwiſe ſhe could be intitled to nothing within thoſe Articles. *Quod curia conceſſit.*

(*a*) Ante 245. *Beale* verſus *Beale.*

And as to Authorities, Mr. *Vernon* cited the Caſe of *Hellier* and *Jones*, determined in the Time of the (*b*) Lords Commiſſioners, and where it was decreed, that a Reverſionary Term for Years, expectant upon the Death of the Mother, ſhould be ſold for the Payment of a Portion at the Marriage of the Daughter; ſo likewiſe was it reſolved in the Caſe of (*c*) *Stainiforth* verſus *Stainiforth.*

(*b*) Decreed by the Lords Commiſſioners the 4th *Nov.* 1 *W. & M.* and afterwards affirmed by their Lordſhips on a Rehearing, and again affirmed upon an Appeal to the Houſe of Lords.

(*c*) 2 Vern. 460.

And in a much ſtronger Caſe than the principal One, that of (*d*) *Gerrard* verſus *Gerrard*, where an Eſtate was ſettled upon Sir *Charles Gerrard* for Life, Remainder to Lady *Gerrard* for Life, Remainder to Truſtees to raiſe 5000 *l.* Portion for a Daughter by the Marriage, if but one, to be paid within ſix Months after the Death of the *Father and Mother*, on the Father Sir *Charles*'s dying, leaving a Daughter and no Son, the Daughter had a Decree for raiſing the Portion in the Life of the Mother the Lady *Gerrard*, who is yet living. And in the Caſe of (*e*) *Corbet* and *Maidwell*, this Caſe of *Gerrard* and *Gerrard* was allowed by Lord *Cowper*, though, it was admitted, he

(*d*) 2 Vern. 458. and cited poſt 489. in *Pierpoint* verſus *Lord Cheney.*

(*e*) Salk. 159.

he ſaid, if it had been *Res integra*, he would not have gone ſo far.

Alſo *Jones (Tho.)* 201. *Greaves* and *Maddiſon*, was cited where a Journeyman Mercer married the Daughter, and the Portion was to be raiſed by a Term for Years, if the Father died without Iſſue Male by the Marriage, and ſhould leave a Daughter; and the Mother on her Death leaving a Daughter, the Judges to whom the Caſe was referred for their Opinion, determined the Portion to be due in the Life of the Father.

Lord Chancellor: Though *Gerrard* and *Gerrard*, and *Greaves* and *Maddiſon* were ſtrong Caſes, yet this Caſe ſeems to go yet farther; and as Lord Chancellor *Cowper* (whom his Lordſhip was pleaſed to ſay he unequally ſucceeded) declared, that if thoſe Caſes had come before him, he would not have gone ſo far, I for my Part declare, I'll not go a Jot farther; but where Things are ſettled, and rendered certain, it will not be ſo material how, as long as they are ſo, and that all People know how to act.

The Words [from the Commencement of the Term] muſt be intended, *Commencement in Poſſeſſion*; and in this Caſe, if the Truſt of the Term had been, that the Truſtees, after the Commencement of the Term, *and not before*, ſhould raiſe the Portion, there could then have been no Doubt, but the Term muſt have commenced before the Portion could be raiſed. Now here thoſe negative Words are plainly implied; for when the Deed ſays, after the Commencement of the Term, it plainly ſhews the Intention of the Parties to be, that it ſhould not be before, and can have no other Meaning.

And the Penning of it in ſuch Manner might be owing to a reaſonable and prudent Care in the Parents, to prevent this Eſtate from being eaten up, and devoured with Intereſt; for if the Reverſion might be mortgaged, it might have been, by the ſame Reaſon, mortgaged immediately on the Marriage, and the Mother being but a little above forty, may be ſuppoſed to live to double that Number of Years, *viz.* to eighty or upwards, within which Time the 300 *l.* Mortgage-Money would be more than trebled, and the Mortgagee might foreclose, and by getting Reports of the Money due might make his Intereſt Principal (as it muſt be after the (*a*) Report confirmed) by which Means the whole Reverſion of 400 *l. per Annum* would be inevitably ſwallowed up.

(*a*) Vide poſt in *Bacon* verſus *Clerk*, 480. and *Brown* verſus *Barkham*, 653.

Therefore to prevent this Hardſhip on the Family, the Words ſeem to have been inſerted, and can have no other Meaning, than that the Portion ſhould be raiſed after the Commencement of the Term in Poſſeſſion, whereby the Parties have fixed a Time for the raiſing it, which Words, though ſo prudently inſerted for the Preſervation of the Eſtate from a Probability of being loſt, the other Side would nevertheleſs have rejected.

Alſo his Lordſhip did not ſeem to take it, that the Portion ſhould carry Intereſt from the Marriage; though I did not obſerve that the Court gave any Opinion as to that Matter, but ſaid, that if it were to yield Intereſt yet decreeing a Mortgage to be made, would carry it further, by putting it in the Power of the Mortgagee, by a Bill of Foreclosure, to make even the Intereſt Principal upon every Report; and that if this Portion was due, the Truſtees (if they thought fit) might make the Mortgage, without coming to the

Court, at leaſt it ſeemed ſo hard a Caſe upon the Reverſioner, that Equity ſhould not decree it.

As to the Objection, that the Settlement did not provide a Maintenance until the Portion was payable, there was no Reaſon that Equity ſhould ſupply it, any more than that it ſhould ſupply the Want of a Portion, if none had been provided; but this might be induſtriouſly omitted by the Settlement, as intending to leave the Child to depend upon the Mother, who, by the Law of the Land, and of Nature, was bound to provide for it.

Moreover the Court obſerved, that here, in the Truſt declared by the Marriage Articles, of the 500 Years Term, it was not ſaid (as uſual) that if there ſhould be Iſſue Male, and ſuch Iſſue ſhould die before twenty-one without Iſſue Male, then the Term ſhould ceaſe. So that if there had been Iſſue Male of the Marriage, and that Iſſue had ſurvived twenty-one, and had at any Time afterwards died without Iſſue Male, the Daughter would have been intitled to her Portion of three thouſand Pounds, and (as the other Side contended) to the Intereſt from her Marriage. [But *Quære*, for this ſeems otherwiſe as to the Intereſt, in regard, if there had been Iſſue Male that attained twenty-one, ſuch Iſſue Male might by a Recovery have barred the ſubſequent Term of 500 Years, and during the Life of ſuch Iſſue Male, the Principal of the Portion would be intirely precarious, and therefore not due, and for the ſame Reaſon could not carry Intereſt.]

That it was no Objection to the Grandfather, that he had received 4000*l.* Portion upon the Son's Marriage with the Plaintiff's Mother, and therefore ought not to ſcruple parting with 3000*l.* to the Plaintiff his Granddaughter; ſince, for that 4000*l.* the Grandfather ſettled a Join-a Jointure of 400 *l.* a Year upon the Son's Wife, which might be ſo long enjoyed by her, as to make it a dear Bargain, upon the common Methods of Purchaſe.

However, the Caſe being of Conſequence, *Lord Chancellor* adjourned it, and directed that in the mean Time Precedents ſhould be laid before him.

Afterwards, upon the (*a*) laſt Day of Cauſes in *Eaſter Term* 1719, *Lord Chancellor*, having taken Time to conſider of the Caſe, did ſolemnly deliver his Opinion.

He ſaid, the Queſtion being, when this Portion of 3000 *l.* ſhould be raiſed? He ſhould anſwer, *prout* the Deed, that it ſhould be raiſed after the Commencement of the Term in Poſſeſſion.

That the declaring by the Truſt of the Term, the Portion ſhould be raiſed after the Commencement of the Term, implied a Negative, that it ſhould not be raiſed before; and if thoſe negative Words had been inſerted, there could have been no Queſtion at all.

That a Declaration of a Truſt was like the preſcribing a Law to a Truſtee which was to be obſerved by him, and contained in it a Prohibition to act to the contrary; it was ſuch an Affirmative, as implied a Negative, in the ſame Manner, as the declaring in the Truſt of the Term, that 3000 *l.* be raiſed, implied, that no more than 3000 *l.* ſhould be raiſed; or as that Part of the Declaration of Truſt, which ſaid the 3000 *l.* ſhould be paid to the Daughter at her Age of twenty-one, implied it ſhould not be paid before twenty-one.

That

(*a*) 8 *May* 1719.

That it had been objected, a Term (eſpecially for the raiſing of Portions) might in ſome Caſes begin earlier in Equity, than it would at Law; as in the Caſe of *Savile* and *Savile* (which was argued this Term) where, upon the Marriage of the Lord *Eland* (Son to the Marquiſs of *Hallifax*) with the Daughter of the Earl of *Nottingham*, a Rent-Charge of 2000*l.* *per Annum* was ſettled upon her for her Jointure, and a Term of ninety-nine Years was limited to commence after the Death of the Lord *Eland* the Huſband, determinable on the Death of his then intended Wife, in Truſt, the better to ſecure to her this Rent-Charge, with Remainder of the Land thus charged, to the firſt, *&c.* Son of the Marriage, with Remainder to Truſtees for 500 Years, to raiſe Portions for Daughters, if no Iſſue Male; the Portions to be paid at the Age of ſixteen, or Marriage, which ſhould firſt happen; and afterwards the Marquiſs of *Hallifax* ſettled the Reverſion, by way of voluntary Settlement, on Sir *George Savile*, ſubject to the Limitations and Charges in his Son's Settlement, and to take Effect on Failure of Iſſue Male of his own Body.

In which Caſe *His Lordſhip* allowed, that this 500 Years Term for Portions took Place in Equity from the Death of the Lord *Eland*, the ninety-nine Years Term being raiſed for a particular Purpoſe only, (*ſcil.*) for ſecuring the Rent-Charge, and ſubject to that Truſt, which extended only to *Part* of the Profits:

Whereas in the Principal Caſe, the whole Profits of the Premiſſes were diſpoſed of until the Commencement of the Term, (*viz.*) to the Mother for her Life, which diſtinguiſhed it from the Caſe of *Savile* and *Savile.*

Again, it had been objected, the Portion was to be paid at the Age of twenty-one or Marriage, and ſince it was expreſly directed, any Clauſe to the contrary might be rejected as well as this.

But ſurely it is a Rule both in Law and Equity, ſo to conſtrue the whole Deed or Will, as that every Clauſe ſhould have its Effect.

He agreed the Intention was to provide for a Daughter; but ſtill not ſo as to raiſe the Portion until the Term ſhould commence; and yet the Words which ordered the Payment of the Portion to the Daughter at her Age of twenty-one or Marriage, ſhould have their Effect; *viz.* they ſhould veſt a Right in the Daughter to this Portion, when ſhe had attained twenty-one, (as ſhe then had) and having attained that Age, her Portion, in Caſe of her Death, ſhould go to her Executors or Adminiſtrators as a veſted Intereſt.

That in the Order and Nature of this Deed, the Portion was firſt to be raiſed, and then to be paid; but ſtill the ſame was not to be raiſed until after the Commencement of the Term; and to take it in any other Senſe was rather expunging than conſtruing.

That there was no Precedent againſt this; *Corbet* and *Maidwell* was a different Caſe; and yet there Lord *Cowper* declared, that he thought Precedents had gone further than he ſhould have carried them.

That the common Methods of Settlements, (*a*) now a Days, directed, that no Sale or Mortgage ſhould be made for raiſing of Portions, until the Premiſſes ſhould come in Poſſeſſion; which though not con-

(*a*) Vide poſt 2 Vol. 99. in the Caſe of *Reresby* verſus *Newland.*

cluſive in this Caſe, yet were they as ſo many Proteſtations againſt the Unreaſonableneſs, and Inconvenience of ſuch Sales of Reverſions; that it would plainly ruin this Eſtate, and the Reverſionary Intereſt therein, if the Daughter and her Huſband had a Power to raiſe the Portion in this Manner; for it muſt carry Intereſt, and that Intereſt may afterwards be made Principal, which, with the Charge of the Suit, would be ſo heavy, that (in all Probability) the Eſtate charged would be foreclosed before it could come into Poſſeſſion, and it would, upon every Removal of the Security, be ſtill harder for the Reverſioner to procure Money.

So that the Portion in this Caſe, though veſted, was not to carry Intereſt until the Term ſhould commence, for all Intereſt is in (*a*) Default of Payment.

(*a*) Ante 418.

However, His Lordſhip ſaid he would not diſmiſs the Bill, for the Parties might ſtill apply for a Sale under this Decree, whenever the Term ſhould come into Poſſeſſion.*

Caſe 131. *At the Rolls.* A Feme Sole Mortgagee in Fee marries, and the Huſband becomes Bankrupt and dies, the Aſſignees of the Bankrupt, and not the Wife, intitled to the Mortgage; *ſecus* if by Articles before Marriage it was agreed that this ſhould continue to the Wife.

Boſvil verſus *Brander*.

A Feme Sole is a Mortgagee in Fee for 800 *l.* and marries a Tradeſman, who becoming a Bankrupt, a Commiſſion of Bankruptcy is taken out againſt him, and the Commiſſioners aſſign over all his Eſtate Real and Perſonal. Afterwards the Huſband dies, and the Writings relating to this Mortgage being in the Aſſignees Hands, the Widow of the Bankrupt brings a Bill in Equity againſt the Aſſignees for theſe Writings, and to have the Benefit of the Mortgage.

---

* But it appears from the Regiſter Book, that afterwards, on the Wife and Truſtees conſenting in Court, Mr. *Butler* the Huſband was allowed to raiſe 1500 *l.* (a Moiety of the Portion) by mortgaging the Reverſionary Term to ſupply his Occaſions in Trade.

This Cauſe came on to be heard, and for it's Difficulty was ordered to be ſpoke to again, when his Honour delivered his Opinion ſolemnly for the Plaintiff the Wife.

But afterwards, being diſſatisfied with that Opinion, he ordered the Decree to be ſtayed, and to be attended again by Counſel.

Whereupon his Honour gave his Opinion, that if there had been any Articles before the Marriage, purporting that this Mortgage Money ſhould continue in the Wife as her Proviſion, or ſhould be aſſigned in Truſt for her, they would have been a ſpecific Lien upon the Mortgage, and have preſerved it from the Bankruptcy.

Alſo, it might have been a Matter of different Conſideration, if the Aſſignees had been Plaintiffs in Equity, and deſired the Aid thereof to ſtrip an unfortunate Widow of all that ſhe had in the World, towards the doing of which, Equity would hardly have lent any Aſſiſtance; becauſe the Aſſignees claiming under the Bankrupt Huſband, could be in no (*a*) better Plight than the Huſband would have been; and if the Huſband had in Equity ſued for the Money, or elſe prayed that the Mortgagor might be foreclosed, Equity (probably) would not have (*b*) compelled the Mortgagor to pay the Money to the Huſband, without his making ſome Proviſion for his Wife; or at leaſt the Wife, by an Application to the Court againſt the Huſband and the Mortgagor, might have prevented the Payment of the Money to the Huſband, unleſs ſome Proviſion were made for her.

(*a*) Ante *Jacobſon* verſus *Williams*, 383.

(*b*) *Jacobſon* verſus *Williams*, ubi ſupra.

But in the preſent Caſe, the *Widow* was Plaintiff againſt the Aſſignees, ſo that *ſhe*, and *not the Creditors* ſought the Aid of Equity.

And here being in the Mortgage Deed a Covenant to pay the Mortgage Money to the Wife, this Debt, or Choſe in Action was well aſſigned by the Commiſſioners to the Aſſignees and veſted in them; like the Caſe of (a) *Miles* verſus *Williams*, where a Bond made to a Wife, *dum ſola*, was adjudged to be liable to the Huſband's Bankruptcy, and aſſignable by the Commiſſioners.

(a) Ante 249.

Wherefore, if the Right to the Debt was veſted in the Aſſignees, (as plainly it was) though the legal Eſtate of the Inheritance of the Lands in Mortgage continued in the Wife, yet this was not material, it being no more than a Truſt for the Aſſignees; like the common Caſe, where there is a Mortgage in Fee, and the Mortgagee dies, here the Mortgage Money belonging to the Executor, though the Heir takes the legal Eſtate by Deſcent, yet he is but a Truſtee for the Executor; for the Truſt of the Mortgage muſt follow the Property of the Debt, elſe the Mortgagor would be in a very hard Caſe, liable to be ſued by the Aſſignees of the Commiſſioners upon the Covenant, and alſo in an Ejectment by the Wife of the Mortgagee; whereas the latter Suit would be injoined in Equity.

One agreeing to leave his Wife 1000 *l.* within three Months after his Death, cannot be inforced in Equity to amend the Security.

Then it was inſiſted, that here were Articles entered into before the Marriage of the Bankrupt and his Wife, by which the Huſband covenanted to ſettle the Wife in the Manor of *Dale*, or to leave her 1000 *l.* within three Months after his Death.

But in this Agreement it appeared that the Huſband had his Election all his Life-Time, and that if the Wife had brought her Bill in Equity againſt the Huſband, ſhe could not have compelled him to do the one or the other; neither could ſhe, upon ſuch Bill, or otherwiſe, have compelled him to give any farther or better Security for the Payment of this 1000 *l.* becauſe ſhe had that Security which ſhe at firſt agreed to take, (*a*) and the Court could not better it againſt her own Agreement.

(*a*) See in the Caſe of *Collins* verſus *Plummer*, ante 107.

But upon another Point, *viz.* as to 200 *l.* Part of the Wife's Portion, on a Note given by the Huſband at his Marriage, ſignifying his Conſent that the Wife ſhould have this 200 *l.* the Court held the ſame was ſpecifically bound thereby, ſo that with Reſpect to this only, the Plaintiff was relieved, and the Bill, as to the reſt, diſmiſſed.

Earl of Thomond verſus *Earl of Suffolk & al'.*

Caſe 132. *Lord Chancellor* Parker.

One deviſes to her Grandchild a Debt of 4000 *l.* owing to the Teſtatrix by *J. S.* provided if any Part of the Debt ſhould be paid in before the Teſtatrix's Death, then ſo much as ſhould be paid in, to be made good to the Grandchild out of the Surplus of her Eſtate. Afterwards the Teſtatrix releaſed 2000 *l.* of the ſaid Debt to *J. S.* without having received any of the Money. Decreed that this was no Ademption of the Legacy *pro tanto*, but that the Legatee or her Repreſentative was intitled to the whole 4000 *l.* as much as if the ſame had been paid in to the Teſtatrix.

THE Counteſs Dowager of *Thomond* had two ſeveral Sums of 2000 *l.* and 2000 *l.* due to her on two ſeveral Bonds, the one for 2000 *l.* from her Grandſon the Plaintiff the preſent Earl of *Thomond*, the other from her Grandaughter in Law, the Lady *Henrietta Obrian*, (afterwards Counteſs of *Suffolk*, and ſince deceaſed) for 2000 *l.* alſo.

The Counteſs Dowager of *Thomond* by Will gives theſe two Sums of 2000 *l.* and 2000 *l.* and all Intereſt due for the ſame, to her Grandaughter the Lady *Mary Obrian*, and deviſes away the Surplus of her Eſtate, with a Proviſo, "that in Caſe all, or any "Part of theſe two Sums ſhould be paid in before "the Teſtatrix's Death, then the ſaid Teſtatrix gives "to the ſaid Lady *Mary Obrian* 4000 *l.* or ſo much "Money as the Principal Money ſo paid in ſhould "amount unto, as the Caſe ſhould fall out."

Afterwards the Teſtatrix, in her Life-Time, releaſed to her Grandſon the Lord *Thomond* the 2000 *l.* which was due to her upon his Bond, without having received any Part of the Money, and died; and her Legatee the Lady *Mary Obrian* died Inteſtate; upon which the Plaintiff the Earl of *Thomond* her Brother adminiſtred to her, and as her Adminiſtrator demanded the 2000 *l.* which was releaſed to himſelf upon his Bond, and alſo the 2000 *l.* due upon the other Bond given by the Lady *Henrietta Obrian*.

The Firſt he demanded out of the Aſſets of the Teſtatrix the Counteſs Dowager of *Thomond*; and the latter he claimed againſt the Defendant the Earl of *Suffolk*, who, though he was not Executor or Adminiſtrator of his ſaid late Counteſs, nor had any legal Aſſets, yet (as was inſiſted by the Plaintiff) remained ſtill chargeable therewith in Equity, in reſpect of a great Jointure which he had long enjoyed by his Lady, and divers rich Jewels, which ſhe brought him upon their Intermarriage.

In regard to the Firſt, it was objected for the Defendants, that the Teſtatrix, after having bequeathed theſe two Sums of 2000 *l.* and 2000 *l.* due upon the two Bonds, to her Grandaughter the Lady *Mary Obrian*, releaſing one of them, was a Revocation, or Ademption of the Legacy *pro tanto*.

That the Diverſity which had been uſually taken, was, if the Debtor ſpontaneouſly and uncalled upon by the Teſtator, paid in a Debt to him, which he (the Teſtator) had before given away by his Will, this was not a Revocation of the Will; for in ſuch Caſe the Teſtator was only paſſive, and did not act himſelf; whereas it muſt be *his* Act, which revokes the Will, and the Teſtator could not help receiving in the Money, if the Debtor would pay it.

But if the Teſtator himſelf called for the Debt, and received it, there it muſt be a Revocation; it being the Teſtator's own Act to call in the Debt.

Now, in the Principal Caſe, it was the Teſtatrix's own voluntary Act to releaſe and extinguiſh that Bond, which ſhe had before deviſed to Lady *Mary Obrian*, and conſequently was a Revocation of the Will for ſo much.

And if this was a Revocation, the ſubſequent Words could not make it a new Beqneſt of two thouſand Pounds out of the Surplus of the Teſtatrix's Eſtate; it being given upon a Condition precedent, *viz.* "If this "4000 *l.* or any Part thereof, ſhould be paid in, then "the Teſtatrix gives 4000 *l.* or ſo much as ſhould "be paid in, out of the Surplus of her Eſtate, to her "ſaid Grandaughter;" but no Part of the 4000 *l.* being paid in, (this 2000 *l.* being releaſed by the Teſtatrix without being *paid in*) here was no new Beqneſt out of the *Reſiduum*.

Alſo the Meaning of the Teſtatrix was ſaid to be, that if any Part of the 4000 *l.* ſhould be paid in, by which the Bulk of the Surplus ſhould be ſo much increaſed, then, and not otherwiſe, the Teſtatrix gave a new Legacy out of ſuch Surplus, *viz.* to the amount of the Money ſo paid in. Beſides, a Releaſe of a Debt was not a Payment, for it was moſt plain, even by the preſent Caſe, that there might be a Releaſe without a Payment.

That it appeared the Words were againſt the Claim of this new Legacy, and as the Words were againſt it, ſo alſo was the Intent of the Teſtatrix, who did not purpoſe to give a new Legacy out of the Surplus to leſſen the ſame, unleſs ſuch Surplus were increaſed by the paying in of this 4000 *l.* or ſome Part of it.

Lord Chancellor: The Teſtatrix intends by this Will (amongſt other Things) to make a Proviſion of 4000 *l.* for her Grandaughter Lady *Mary*; and though ſhe had ſhewn her Kindneſs to her Grandſon (one of theſe Bonds being given by him for 2000 *l.*) yet this no ways imports an Alteration, or Diminution of her Kindneſs to her Grandaughter. I cannot approve of the Diverſity, that if the Teſtator gives away a Debt by his Will, and afterwards calls it in, this muſt be a Revocation; *ſecus* if it be paid in to the Teſtator unaſked for; for ſuppoſe the Teſtator called in that Debt, fearing it might (*a*) be loſt, and not liking the Security; is there any Reaſon that this ſhould deprive the Legatee of his Legacy? And the Caſe of *Orme* and *Smith* (*b*) proves that the Teſtator's receiving in the Debt is no Revocation or Ademption of the Legacy.

(*a*) See 2 Vol. 330. & 471. in the Caſe of *Ford* verſus *Flemming* accord'.

(*b*) 2 Vern. 681.

As to the Matter of the Releaſe, that ſurely implies Payment and Satisfaction of a Debt, being tantamount to the Teſtator's receiving it, and giving it back again; and in the preſent Caſe, it is the ſame, as if the Will had ſaid, *if theſe Debts be paid or diſcharged.*

There has been an Objection made, that the Plaintiff the Lord *Thomond*, being Adminiſtrator to his Siſter Lady *Mary*, craves a double Advantage of this Debt; for firſt (ſay they) it is given him by the Releaſe, and then he takes it over again by the Will, as repreſenting his Siſter.

But it is to be obſerved, that his Claim as repreſenting his Siſter, is in (*a*) *Auter Droit*, and as if the Siſter was alive and made her Claim; it muſt be liable to her Debts if ſhe owed any, and is the ſame Thing, as if any other Perſon had been her Executor or Adminiſtrator.

(*a*) Vide 1 Vern. 284. *Jaſon* verſus *Jarvis*, & *Copping* verſus *Copping*, 2 Vol. 295.

With regard to the other Point, *viz.* the Plaintiff's Demand due by Bond from the Defendant's Wife *dum ſola*, againſt the Defendant her Husband, in reſpect that he had received much by the Conſequences of the Marriage:

It was urged, that though the ſame was not legal Aſſets, yet there was great Reaſon, the Defendant ſhould be liable, in Equity, on account of the Benefit ſo received.

That if an Husband ſhould have a vaſt Portion with a Wife, in Goods, ready Money, or Jewels, or become intitled to a Term for Years in her Right, and the Wife ſhould die, owing a Debt contracted *dum*

ſola,

ſola, there was great Equity, (though theſe might not be legal Aſſets,) that the Husband ſhould be charged by reaſon thereof, and not go away with his Wife's Fortune, at the ſame Time that he was not liable to pay her Debts. *

Feme Sole owes Debts by Bond, and takes Huſband and dies leaving no Aſſets, but at the Marriage had a Term for Years, a Jointure, a Shop of Goods, or other Perſonal Eſtate, in Conſideration of which the Husband makes no Settlement; Husband not liable.

That here the Queſtion in Equity was, whether the Husband had not with his Wife ſo much as would pay this Debt? If he had, he ought to pay it; and it might be a common, and would be a hard Caſe, if there were a Feme Sole Trader, who had a Shop full of valuable Goods, and ſhe ſhould marry, and die indebted, there the Husband ſhould by the Marriage be intitled to all theſe Goods, which yet, not being legal Aſſets, would not be liable; ſurely under ſuch Circumſtances, nothing could be more reaſonable, than that he ſhould be charged with his Wife's Debts.

It was admitted to be different, where the Husband makes a Settlement in Conſideration of a Portion; for in that Caſe, he being a Purchaſer, the Portion ſhall not be Aſſets to pay the Debts of the Wife; *ſecus* if the Husband makes no Settlement.

That in the Principal Caſe, the Jewels which the Defendant the Earl of *Suffolk* had with his Wife, together with a Rent-Charge of 1500 *l.* a Year, that he was intitled to in her Right, ought to be liable to the Wife's Debt *dum ſola*, and Equity ſhould favour any Conſtruction for the Payment of Debts. See the Caſe of *Freeman* verſus *Goodham*, Chancery Caſes 295, where Lord Chancellor *Nottingham*, with ſome Earneſtneſs, ſaid, *he would change the Common Law in that Point.*

---

* In the Office of Executor, Chap. 17. Sect. 1. this is mentioned as an hard Caſe, and proper for Equity.

On the other Side it was inſiſted, that the Defendant the Earl of *Suffolk* was neither Executor nor Adminiſtrator of his late Counteſs; nor was it pretended, that he had poſſeſſed himſelf of any Thing that was her legal Aſſets; ſo that at Law he was no ways liable to this Bond.

And in Equity, all Circumſtances, when conſidered, were rather in his Favour, as that he had before, or ſoon after the Marriage, paid ſuch of his Lady's Debts as were diſcloſed to him, and advanced conſiderable Sums for her.

That the two thouſand Pound Bond in Queſtion was not diſcovered to him at the Time of the Marriage, nor until long after; which if it had appeared, he might have lived in that provident Manner, as to have paid this her Debt out of her own Eſtate.

That it was in the Election of the Counteſs Dowager of *Thomond*, with regard to this two thouſand Pound Bond, to have made the Defendant the Earl of *Suffolk* liable, by putting the Bond in Suit, and recovering Judgment upon it, during the Coverture; that ſhe had a long Time to make her Election, the Marriage having continued ten Years or upwards, and her chuſing not to put this Bond in Suit, was tantamount to a Declaration that ſhe would abide by her original Security, and not involve the Defendant the Earl therein; and, on the other Hand, there could be no Queſtion, but it was in the Power of the Counteſs Dowager of *Thomond* to chooſe that Security for her Debt, it being the ſame which was originally given her.

That a Court of Equity would poſſibly relieve, in Caſe the Wife, who was the Debtor, had died in ſo ſhort a Time, as that Judgment could not have been obtained againſt the Husband; but there was not the like Reaſon that Equity ſhould relieve, when the Teſtatrix had Time ſufficient to have made the Husband liable, and yet, voluntarily, nay, perhaps *induſtriouſly*, had omitted it.

That, by the known Rules of Law, the Husband was only liable during the Coverture, and here not being Circumſtances to vary the Law, Equity ought not to interpoſe.

Indeed, if there had been a great Perſonal Eſtate of the Wife, or if Part of that Eſtate had ſtill remained in Specie, (as in the Caſe of a Term for Years) there might have been ſome Ground for an Application of this Nature; but in the preſent Caſe it was proved, that the Defendant the Earl of *Suffolk*, ſince this Marriage, had advanced his Manner of Living, and that the Increaſe of his Charge had amounted to the full Value of his Counteſs's Jointure.

Lord Chancellor: If the Defendant the Lord *Suffolk* the Husband had been Executor or Adminiſtrator of his Wife, or Executor of his own Wrong, he had been liable at Law as far as Aſſets; (*a*) but in none of theſe Capacities does he appear before the Court. Any Perſon, that has any of the Counteſs of *Suffolk*'s Aſſets, is liable: the Creditor the Counteſs of *Thomond* had a fair Opportunity of recovering Judgment againſt the Earl and Counteſs of *Suffolk*, and thereby of making the Earl of *Suffolk* liable; but this ſhe has not done, and (for ought appears) has purpoſely omitted.

(*a*) Ante 380. in *Squib* verſus *Wyn*.

The Huſband during the Coverture is anſwerable for the Wife's Debts; and as perhaps this may be hard when he has nothing with her, ſo you are to ſet againſt ſuch Hardſhip, that if the Huſband has received a Perſonal Eſtate with his Wife and happens not to be ſued during the Coverture, he is not liable.

But it is to be conſidered, that the Huſband during the Coverture is to anſwer for the whole Debts of the Wife though he had nothing with her; whereas an Executor or Adminiſtrator is reſponſible only ſo far as he has Aſſets.

As to the Caſe that has been put, where a Huſband marries a Feme ſole Trader and the Wife dies indebted, that though the Huſband in ſuch Caſe be not at Law liable to the Debts, yet he ought to be ſo in Equity;

That is with me a Queſtion; for the Huſband runs a hazard in being liable to the Debts much beyond the Perſonal Eſtate of the Wife, and in Recompence for ſuch Hazard, he is intitled to the whole of the Perſonal Eſtate though exceeding the Debts, and diſcharged therefrom, and indeed is intitled to the ſame upon the very Marriage.

And with regard to the Jointure injoyed by Lord *Suffolk* during the Coverture, that might have determined the next Moment after Marriage; though how long ſo ever it continued, it was in the Huſband's Power during the Coverture to ſell and diſpoſe of it at his Diſcretion.

Upon the whole, it would be a great Imputation upon the Court in a Caſe thus circumſtanced, to make the Defendant the Earl of *Suffolk* liable to the Bond of his Wife *dum ſola*; wherefore as to this, let the Bill be diſmiſſed with Coſts. *

Caſe 133. *Lord Chancellor* Parker.

Short verſus *Wood.*

Where Money is directed to be laid out in a Purchaſe of Land and to be ſettled on *A.* for Life, Remainder to *B.* in Tail, Remainder to *C.* in Fee; if *A.* and *B.* bring a Bill for the Money, they ſhall not have it, becauſe of the Contingency to *C.* But if Money were directed to be laid out in a Purchaſe of Land to be ſettled on *A.* for Life, Remainder to *B.* in Tail, Remainder to ſaid *B.* in Fee; *A.* and *B.* bringing a Bill ſhall have the Money decreed them.

TRuſt Money is directed to be laid out in Land and ſettled upon a Woman for Life, Remainder to her firſt, &c. Son in Tail, Remainder to ſuch Son in Fee, and in the mean Time and until a Purchaſe can be found, the Money to be put out at Intereſt, and the Intereſt to go as the Profits of the Land, &c.

The Mother and Son (there being only one Son) come to an Agreement, that this Money ſhould be paid, a Third to the Mother, and two Thirds to the Son, and bring a Bill againſt the Truſtees to pay it, who ſubmit to the Court being indemnified.

Lord Chancellor, on hearing this Cauſe by Conſent ſaid, that Lord *Cowper* had determined, that if a Remainder Man had but a Chance for the Eſtate or the Money, which could not be barred without a Recovery, there in regard the Tenant in Tail might die before ſuch Recovery ſuffered, or might die in a Vacation, when a Recovery could not be ſuffered, a Court of Equity, whoſe Buſineſs it is to aid the Intent of the Party ought not, in Violation of ſuch Intent, to decree the Payment of the Money to the Tenant in Tail, but ought to Decree it to be laid

---

* Agreeable to this Reſolution and on the Authority thereof, was the Caſe of *Heard & Ux'* verſus *Stamford & Ux'* determined by Lord *Talbot* in *Lincoln*'s *Inn Hall*, *March* 8. 1735-6.

laid out in a Purchaſe of Land to be ſettled according to the Direction of the Party, in order that the Chance which was intended the Remainder Man, might be preſerved, and when the Settlement was made, the Tenant in Tail might if he thought fit ſuffer a Recovery. Which Matter was ſo decreed by Lord Chancellor *Cowper* in the Caſe of one Mr. *Colwall* and Dr. *Shadwell* (*a*), and where the Chance afterwards actually happened in Favour of the Remainder Man by the Death of the Tenant in Tail before any Recovery ſuffered.

(*a*) See the Caſe cited poſt 485. in the Caſe of *Chaplain* verſus *Horner*.

But that in the Principal Caſe, where the Mother was Tenant for Life, with Remainder to the Son in Tail, Remainder to the ſame Son in Fee, ſo that the Son might by a Fine (*b*) only, bar theſe Limitations, and which Fine might be levied in Vacation Time as well as Term, it would be in vain for Equity to decree a Settlement which the ſame Moment that it was made, might be cut off.

(*b*) Vide ante *Benſon* verſus *Benſon*, 131.

Therefore his Lordſhip directed the Truſtees to pay the Money to the Mother and Son purſuant to the Agreement, and to be indemnified, but ſaid that if there had been two Sons or any Perſon in Remainder, he would not have decreed the Payment of this Money.

See 2 Vol. 175.

It ſeems alſo that if the Son had been an Infant, (*c*) the Court would not have ordered the Payment of the Money; for during the Infancy no Fine could have been levied.

(*c*) Ante in *Legate* ver. *Sewell*, 90.

Willis

Caſe 134.
Lord Chancellor Parker.

Deviſe of Land to the Teſtator's ſecond Son for his Life, he or his Heirs paying a Rent thereout to the eldeſt Son for his Life, and after the Death of the ſecond Son *and his Wife*, Remainder to the firſt *&c.* Son of the ſecond Son. The Wife of the ſecond Son had an Eſtate for Life by Implication, by the Opinion of Lord Chancellor *Parker.*

Willis verſus *Lucas*.

JOhn Lucas was ſeiſed in Fee of ſome Houſes in *London*, and of ſome Land in Gavelkind in *Lewiſham* in *Kent*, and having three Sons *John*, *James* and *Samuel*, made his Will, by which he deviſed all his Lands in *Kent* and his Houſes in *London* to his youngeſt Son *Samuel* (the Defendant's Huſband) for his Life, he or his Heirs paying out of the Rents of the Premiſſes 10 *l.* a Year to the Teſtator's eldeſt Son *John Lucas* for his Life, and alſo 10 *l.* a Year to the Teſtator's ſecond Son *James* for his Life, and alſo 10 *l.* a Year to the Teſtator's Daughter *Mary* (now the Wife of *David White*) for her Life, alſo paying his Legacies; and that after the Death of the ſaid *Samuel Lucas and the Defendant* Mary *his Wife*, then the Son or Sons of the ſaid *Samuel* ſhould have all the ſaid Premiſſes equally between them, they or their Brothers paying the Legacies as aboveſaid; and if no ſuch Sons, then the Daughter or Daughters of *Samuel* to have the ſaid Premiſſes equally amongſt them, paying, *&c.*

The Teſtator died, alſo *James Lucas* died leaving Iſſue, then *John Lucas* the eldeſt Son died leaving Iſſue a Daughter, after which *Samuel Lucas* died, leaving the Defendant *Mary* his Widow and three Infant Children; whereupon the Daughter of the ſaid *John Lucas* brought an Ejectment for the Recovery of the Premiſſes againſt the Defendant the Widow of *Samuel*, who giving in Evidence an old ſubſiſting Term of the Premiſſes, the ſaid Daughter the Heir of the Teſtator's eldeſt Son *John Lucas*, preferred this Bill in Equity for an Account of the Rent of the Premiſſes againſt the Defendant ſendant the Widow of *Samuel*, and to ſet aſide the old Term which had been made uſe of againſt the Plaintiff at Law.

The only Queſtion was, whether the Defendant *Mary Lucas* the Widow of *Samuel* had an Eſtate for Life *by Implication*, the Premiſſes in Queſtion being deviſed to *Samuel* for his Life, and after the Death of him *and* Mary *his Wife*, then to the Sons of *Samuel*; or whether during the Life of the Wife of *Samuel*, the Premiſſes ſhould deſcend to the Plaintiff the Heir at Law of the Teſtator, as an Eſtate undiſpoſed of by the Will, during the Life of *Samuel*'s Wife.

It was urged for the Plaintiff, that it had been ſettled by many Authorities in the Books *viz.* the 13 *H.* 7. 17. *Jones* (*Tho.*) 98. 2 *Lev.* 207. 1 *Vent.* 203. *Vaugh. Rep.* 259. (*Gardiner* verſus *Sheldon*) that nothing leſs than a (*a*) neceſſary Implication could intitle the Wife to an Eſtate for Life, and the known Diverſity was, where I deviſe Land to my *Heir* after the Death of my Wife, this is a Deviſe by Implication to her for Life; but if I deviſe Lands to my *Second* or *Third Son*, after the Death of my Wife, this is no Deviſe by Implication to her, but the Lands during her Life ſhall deſcend to the eldeſt Son as Heir.

(*a*) *Philips* verſus *Philips*, 39.

And therefore in this Caſe, the Deviſe being to *Samuel* the Teſtator's youngeſt Son for Life, and after the Death of him and his Wife, to *Samuel*'s Son or Sons, and *Samuel* being dead leaving Sons, theſe were excluded until after the Death of the Wife, and ſhe could not take, there being no neceſſary Implication that ſhe ſhould; ſo that in the mean

Time the Premiſſes muſt deſcend to the Plaintiff (the Teſtator's Heir at Law) as an Eſtate undiſpoſed of.

It was moreover inſiſted by Serjeant *Cheſhire*, that the Payments of the ſeveral Annuities of 10 *l.* out of theſe Premiſſes were out of the Caſe, for whether the Wife of *Samuel*, or the Heir at Law of the Teſtator, was to have the Premiſſes, theſe ſeveral Annuities were not to be paid during the Wife's Life after the Death of *Samuel*, it being ſaid in the Will, that *Samuel or his Heirs* were to pay theſe Annuities, and not that *the Wife* ſhould pay them.

To all which it was anſwered, and *Lord Chancellor* ſo held, that the Defendant *Samuel's* Widow was intitled to the Premiſſes during her Life by Implication.

He obſerved it had been admitted, that if the Deviſe were to the Heir after the Death of the Wife, in ſuch Caſe ſhe would take by Implication; and that in this Caſe it appeared to be equally the Intention of the Teſtator, that his Heir at Law ſhould not have the Premiſſes, and that they ſhould not deſcend to him; for that the Will appointing the Heir ſhould have a Rent of 10 *l.* a Year out of the Land for his Life, plainly implied he ſhould not have the Land itſelf.

That theſe Rents were not to ſink upon the Death of *Samuel*, and during the Life of the Wife, they being expreſly given to the ſeveral Annuitants (which were three in Number) for their Lives, and were plainly intended as a certain Proviſion for all theſe Annuitants in all Events during their Lives; ſo that it was, as if theſe ſeveral Annuities were in the firſt place given by the Will to the ſeveral Annuitants, and the Lands afterwards given ſubject to theſe Annuities;

ties; from whence it ſeemed to have been the Teſtator's Intent, that whoever took the Land ſhould pay the Annuities and that *Samuel's* Wife ſhould be liable to the Annuities, which appeared in the Cauſe (and without Contradiction) to have been all along paid by her ſince her Husband's Death.

In the next place it was argued, that if this Point were againſt the Widow, yet ſtill as to the Gavelkind Lands, (for the (*a*) Lands being in *Kent*, muſt be intended to be Gavelkind, unleſs they appear to have been diſgavelled) *Samuel's* Wife muſt have them all for her Life, and not a Third only.

(*a*) Sid. 138. 1 Mod. 98.

That in Gavelkind all the Sons were as Daughters or (*b*) Coparceners, and if a Man had three (*c*) Daughters and were to deviſe his Lands to his third Daughter after the Death of his Wife, ſhe would have an Eſtate for Life in the whole by Implication; for all the Daughters make but one Heir, and whatever deſcended muſt deſcend to all of them, for ſince the Lands could not deſcend to all of them during the Wife's Life, they could not deſcend to *any* of them, but the Wife ſhould have the whole by Implication.

(*b*) Parceners by the Cuſtom. Litt. Sect. 265.

(*c*) 2 Vern. 723.

That to this Effect was the Caſe in *B. R.* (*d*) *Reading* verſus *Royſton* in Lord C. J. *Holt's* Time, where a Man had two Daughters, and ſeiſed of Lands in Fee, deviſed them to one of his Daughters in Fee; upon which the Queſtion was, whether the Deviſee took the whole by Deviſe, or a Moiety by Deſcent; and adjudged on great Conſideration, that ſhe took the whole by Deviſe; for that one Coparcener only could not poſſibly take by Deſcent, the one Daughter not being Heir, and whatever deſcended muſt deſcend to both Daughters, for it could not deſcend to one Daughter only.

(*d*) Salk. 242.

So in the preſent Caſe, theſe Gavelkind Lands would not upon the Death of *Samuel* deſcend to the Sons of all the three Brothers, in regard the Sons of *Samuel* were not to take until after the Death of *Samuel* and his Wife, and if they would not deſcend to *all*, they could not deſcend to *any*, conſequently the Defendant the Wife of *Samuel* ſhould take the whole Gavelkind Lands during her Life.

Lord Chancellor ſaid nothing as to this, but ſtrongly inclined for the Defendant the Widow of *Samuel*, that ſhe took an Eſtate for Life by Implication upon the firſt Point. However,

It being Matter of Law, and an ill penned Will, the Court ordered a Caſe ſhould be made of it, and that it ſhould be referred to the Judges of *B. R.*

Caſe 135.

Anonymus.

If in an inferior Court I am ſued for a Matter out of the Juriſdiction, in Vacation Time, a Prohibition lies in Chancery on Affidavit that the Matter is out of the Juriſdiction, but no Affidavit is neceſſary, where, on the Face of the Declaration, the Matter appears to be out of the Juriſdiction.

IF one be ſued in an inferior Court for a Matter out of the Juriſdiction, the Defendant may either have a Prohitition from one of the Common Law Courts of *Weſtminſter Hall*, or in regard this may happen in a Vacation when only the Chancery is open, he may move that Court for a Prohibition; but then it muſt appear by Oath made, that the Fact did ariſe out of the Juriſdiction, and that the Defendant tendered a foreign Plea, which was refuſed. And if a Prohibition has been granted out of Chancery *improvidè*, and without theſe Circumſtances attending it, the Court will grant a *Superſedeas* thereto.

But in Caſe it ſhall appear on the Face of the Declaration, that the Matter is out of the Juriſdiction of the Court, then a Prohibition will be granted without Oath of having tendered the foreign Plea, and in theſe Caſes Equity imitates the (*a*) Common Law.

(*a*) Vide Salk. 549. & poſt *Saunderſon* verſus *Clogget*, 657.

And in a late Caſe which was moved the laſt Seal after *Trin.* Term, where the Court had granted a Prohibition to an Action brought in the Courts at *London*, upon an Affidavit that the Matter aroſe out of the Juriſdiction, it appearing at another Day that the Defendant had imparled generally (which admitted the Juriſdiction) and ſo could not afterwards be allowed to plead a Foreign Plea, the Court granted a *Superſedeas* to the Writ of Prohibition.

By imparling generally you admit the Juriſdiction and cannot afterwards plead a Foreign Plea.

DE
Term. S. Michaelis,
1718.

Caſe 136.
At the Rolls.
Preced. in Chan. 500.

One deviſes Lands to his Wife for Life, and after her Death to his Son in Fee, upon Condition to pay his Daughter 1000*l.* within a Year after the Death of *J. S.* with a Proviſo that if the Money be not paid the Daughter may enter and receive the Profits till Payment; *J. S.* dies living the Wife, the Daughter ſhall have the 1000 *l.* during the Life of the Mother, and in Default of Payment Equity will decree a Sale of the Reverſion.

Bacon verſus *Clerk*.

ONE ſeiſed in Fee of ſome Lands in Poſſeſſion, and of other Lands in Reverſion after the Death of *A.* and having a Son and Daughter, deviſes the Lands which he had in Poſſeſſion, to his Wife for Life, and from and after the Death of his Wife and alſo after the Death of the Leſſee for Life of the other Lands, he deviſes theſe reſpective Premiſſes to his Son and his Heirs upon Condition, " that the Son ſhould " within a Year after the Death of a third Perſon, " one *Eliz. Herne*, (after whoſe Life it was ſaid, " but not proved, that the Teſtator had other Lands " in Reverſion) pay 1000 *l.* to the ſaid Teſtator's " Daughter, with a Proviſo that upon Non-payment " the Daughter might enter upon the Premiſſes.

Elizabeth Herne dies, and a Year after her Death the Daughter marrying brings a Bill for a Sale of this Reverſion, in order to raiſe the 1000 *l.* Portion and Intereſt from the End of the Year after *Elizabeth Herne*'s Death.

It was objected for the Defendant, that a Sale of a Reverſion was hard in any Caſe, and the Heir favoured in Law; and if the Reverſion ſhould be ſold to pay this Portion and Intereſt, it would deſtroy the Proviſion for the Son, who as *Heir* was more to be favoured than a Daughter.

That though it was admitted a Deviſe of Lands to an Heir *upon Condition to pay* did raiſe a Truſt in Equity (the Condition being void at Law, in regard none but the Heir could take Advantage thereof) and it being a Truſt, Equity would direct a Sale or Mortgage to raiſe the Money, yet in this Caſe the Will had preſcribed and chalked out a Remedy for the Daughter's Recovery of her Portion, *viz. by an Entry upon the Eſtate*, and that ſhewed the Daughter was not to have the Portion until the Eſtate was become capable of being entered upon, namely, when the Eſtate in Reverſion was fallen into Poſſeſſion, and the Teſtator having preſcribed this Remedy, the Daughter ought not to take any other; beſides, it was unreaſonable that the Son ſhould pay any Thing until he had received ſome Advantage by the Will.

But on the other Side it was anſwered, and decreed by the Court, that a Reverſion was an Eſtate, and a beneficial one too, and might as well as any other Eſtate, be deviſed upon Condition.

That if the Mother or Tenant for Life were dead, and *Elizabeth Herne* were living, it would be granted the Daughter could not recover the 1000 *l.* Legacy, though the Son were by the Death of the Mother, or of the Tenant for Life, come into Poſſeſſion: And if ſo, to tye the Daughter down to ſtay till *Elizabeth Herne* was dead, though the Son were come into Poſſeſſion, and on the other Hand not to let the Daughter have it on the Death of *Elizabeth Herne*, would be very unequal.

That by the expreſs Words of the Will the Legacy was to be paid to the Daughter within a Year after the Death of *Elizabeth Herne*, and as it was a Portion, and a Daughter's Portion given her by her own Father, it was to be favoured.

That ſuppoſing it to be a Hardſhip for the Son to pay it before ſuch Time as the Eſtate given him by the Will was come into Poſſeſſion, it might alſo be a Hardſhip on the other Hand, for the Daughter to ſtay until after the Death of the Mother, who might live as long as her ſelf, and then it would not anſwer the End of the Gift, which was to prefer her in Marriage.

But that in Truth this was not any Hardſhip; for the Legacy would carry Intereſt from a Year after the Death of *Elizabeth Herne*, which Intereſt when computed by a Maſter, would be made Principal and carry (*a*) Intereſt, and ſo it would be no more a Hardſhip upon the Son to ſell the Reverſion *now*, than *after the Death of the Mother*, when the running on of Intereſt would have increaſed the Burthen. And by the ſame Reaſon the Daughter muſt ſtay till both the Lives were dropt; that if the Hardſhip muſt be on one Side or other, the expreſs Direction of the Teſtator ought to take place and be purſued.

(*a*) Vide ante *Butler* verſus *Duncomb*, 453. poſt *Brown* verſus *Barkham*, 653.

For which Reaſons the *Maſter of the Rolls* decreed the Portion to be raiſed by Sale, unleſs the Son ſhould pray it might be done by Mortgage.

This

This Decree was appealed from to *Lord Chancellor Parker* who affirmed the ſame.

Shales verſus *Sir John Barrington*, & *econtra*.

Caſe 137.
Lord Chancellor Parker.

SIR *Charles Barrington* had ſettled an Eſtate upon himſelf in Tail, Remainder to his Second Couſin the Defendant (who was preſumptive Heir to the Honour in Caſe of Failure of Iſſue Male of Sir *Charles*) for Life, Remainder to the Firſt, *&c.* Son of the Defendant in Tail Male, Remainder over, with Power of Revocation reſerved to Sir *Charles* who ſometime afterwards revoked the old Uſes, and limited new ones upon his younger Siſter Mrs. *Shales* for Life, Remainder to her Firſt and every other Son in Tail Male, they taking the Name of *Barrington*, *&c.*

Then Sir *Charles* died, and the Honour deſcended to the Defendant, upon which Mrs. *Shales*'s Infant Sons brought their Bill againſt Sir *John Barrington* to eſtabliſh the Deed of Revocation, and Limitation of new Uſes. And the Defendant Sir *John* brought his Bill to ſet this latter Deed aſide, and to recover ſome Legacies given him and his Children by the Will of Sir *Charles*.

Afterwards the Defendant Sir *John* dying, his two Infant Sons revived the Suit, and entered into very long and expenſive Examinations; but the Deed of Revocation and new Settlement was fully proved, and the Proof againſt it no ways poſitive, but circumſtantial only, as to ſeveral Expreſſions of Sir *Charles* declaring that he intended his Eſtate ſhould go with his Honour, and that it would be a very ill Thing in him to do otherwiſe, *&c.*

Words no Evidence againſt a Deed ſolemnly executed.

Lord Chancellor: Words can have no Weight againſt a Deed ſo ſolemnly executed as this. Therefore the Deed of Revocation and Limitation of new Uſes muſt ſtand.

Heir at Law, or Heir Male to the Honour of the Family, if probable Cauſe to contend for the Family Eſtate, ſhall not pay Coſts.

But it being inſiſted, that the Defendant ought to pay Coſts upon his Croſs Bill, ſo far as it controverted the Deed:

His Lordſhip denied Coſts; for that though the Defendant was not Heir at Law, yet he was very like one, being Heir to the Honour of the Family; he found by Deed an Eſtate veſted in him in Remainder, and not being privy to the Deed of Revocation, it was lawful, nay reaſonable for him to make this Enquiry. Beſides, but a ſmall Part of the Suit was carried on by the Defendants Father; and the Defendants themſelves were Infants, and had good Ground of Suit for their Legacies; and a great Eſtate being given from the Honour, it was ſufficient for the Plaintiff *Shales* to go away with ſuch Eſtate, without having Coſts into the Bargain.

Caſe 138.
At the Rolls.
Preced. in Chan. 502.

Harris verſus *Lee.*

Baron gives Feme the foul Diſtemper, *A.* lends the Wife 30 *l.* to pay the Doctor for her Cure; Baron deviſes Lands for the Payment of his Debts; this 30 *l.* is a Debt of the Huſband, and *A.* is a Creditor in the Doctor's Place.

J. S. had given his Wife the foul Diſtemper twice, upon which the Wife leaving her Huſband and coming to Town to be cured, borrowed 30 *l.* of the Plaintiff to pay Doctors and Surgeons and for Neceſſaries; afterwards *J. S.* deviſed ſome Lands for the Payment of all his Debts and died.

The Plaintiff brought his Bill againſt the Truſtees who were impowered by the Will to ſell the Land for the Payment of Debts, in order to be paid this Money, as a Debt within the Truſt.

Objected, A Wife cannot by Law borrow Money, nor contract a Debt by borrowing Money, even though ſuch Money be afterwards applied for Neceſſaries; becauſe it was in her Power to waſte the Money; *(a)* and if the *Law* be ſo, it would be hard to have a different Rule of Property *in Equity*.

(*a*) 1 Salk. 387.

Sed per Cur': Admitting the Wife cannot at Law borrow Money, though for Neceſſaries, ſo as to bind the Huſband, yet this Money being applied to the Uſe of the Wife for her Cure and for Neceſſaries, the Plaintiff that lent this Money, muſt in Equity ſtand in the Place *(b)* of the Perſons who found and provided ſuch Neceſſaries for the Wife. And therefore, as ſuch Perſons would be Creditors of the Huſband, ſo the Plaintiff ſhall ſtand in their Place and be a Creditor alſo, and let the Truſtees pay him his Money and likewiſe his Coſts.

(*b*) Vide poſt *Marlow* verſus *Pitfield*, 559.

Chaplin verſus *Horner & ux'*.

Caſe 139.
At the Rolls.

Where Money is covenanted to be laid out in a Purchaſe of Land and to be ſettled on *A.* in Fee, the Heir and not the Executor of *A.* ſhall have it. But if *A.* himſelf has received any of this Money, this is a good Payment, and ſhall not be repaid by *A.*'s Executor to his Heir. Alſo if *A.* in this Caſe dies, *A.*'s Heir ſhall recover the Remainder of the Money not received by *A.* So if *A.*'s Heir is an Infant, and the Remainder of the Money is decreed to be brought into Court, it ſhall be looked on as Land.

James Chaplin the Plaintiff's Father, on his Marriage with the Plaintiff's Mother, (now the Wife of Defendant *Horner*) in Conſideration of 3000 *l.* Portion, made a Settlement of Land to the Uſe of himſelf for Life, Re-

Remainder to the Wife for Life, Remainder to the Sons of the Marriage in Tail Male, Remainder to the Daughters of the Marriage in Tail General, Remainder to his own right Heirs; alſo the Plaintiff's Father covenanted to lay out 2000 *l.* (then in the Hands of Truſtees) in the Purchaſe of Lands to be ſettled on himſelf and his Heirs.

The Marriage took Effect, and there was Iſſue thereof only the Plaintiff a Daughter.

Not long after the Plaintiff's Father died inteſtate, but before his Death he had received 1350 *l.* Part of this 2000 *l.* which on the Marriage was ſecured on a Mortgage from one Mrs. *Avery* the Wife's Mother, and having received this 1350 *l.* laid it out in the Purchaſe of an Office for his Life.

After his Death, his Widow the Plaintiff's Mother took out Adminiſtration to him, and the Plaintiff *Elizabeth Chaplin*, as the only Iſſue and Heir of her Father, brought this Bill to have the Covenant in the Marriage Settlement performed in Specie, and likewiſe claiming two Thirds of her Father's Perſonal Eſtate under the Statute of Diſtribution.

Mr. *Vernon* for the Defendant inſiſted, that the 1350*l.* being paid to the Plaintiff's Father, who would have had an abſolute Power over the Land if purchaſed and ſettled, this Payment was a good Payment, and ought not to be refunded by his Adminiſtrator, in order to be inveſted in Land for the Benefit of the Plaintiff the Heir; which was agreed by the *Maſter of the Rolls*.

He next inſiſted, that the remaining 650 *l.* ought not to be laid out in Lands, but to be looked upon as

Perſonal Eſtate, and the Defendant the Widow to be intitled to a Third thereof, the old Rule of the Court being (*a*) that if Money were agreed to be laid out in a Purchaſe of Lands to be conveyed to *A.* in Fee, if *A.* had brought a Bill for the Performance of this Truſt, Equity would have decreed the Money itſelf to *A.* nay that formerly the Court went further, *viz.* where Money was to be laid out in Land and ſettled on *A.* in Tail Remainder over, and *A.* brought a Bill for the Performance of this Truſt, the Court has in ſuch Caſe decreed the Money to * *A.* becauſe if the Land were bought and ſettled on *A.* in Tail, he might ſuffer a Recovery and bar the Intail, and turn the Land into Money again; ſo that in the ordering of ſuch Purchaſe and Settlement, the Court would be doing a vain Thing; and that this was the Practice till Lord *Cowper's* Time, when in the Caſe of (*b*) *Colwal* and *Shadwell* the Court decreed the Truſt Money to be laid out in a Purchaſe of Land and ſettled on *A.* in Tail, Remainder to *B.* in Tail, to the Intent that the Iſſue in Tail and the Remainder Man might have the Benefit of the Chance intended them by the Perſon creating the Truſt, in Caſe the Tenant in Tail ſhould die before ſuffering a Recovery or levying a Fine.

(*a*) Vide the Caſe of *Seely* verſus *Jago*, ante 389.

(*b*) Cited ante 471.

But that here the Plaintiff's Father being to be *Tenant in Fee* of the Lands when purchaſed, and having an abſolute Power over it as well by Will as otherwiſe, and

6 H

---

* In the Caſe of ——— verſus *Marſh* in *Eaſter* Term 1723, at the Rolls, where Money was articled to be laid out in Land, and ſettled on the Firſt and other Son in Tail, and the Court, in order to preſerve the Chance to the ſecond Son, would not decree the Money to the eldeſt Son, but ordered the ſame to be inveſted in a Purchaſe purſuant to the Articles; the eldeſt Son got one to lend him a Purchaſe, and to ſettle it with an Intention forthwith to ſuffer a Recovery, and to reconvey the Eſtate back to the Seller; and though all this appeared by the Maſter's Report, yet *His Honour* (after ſome Heſitation) allowed it. *Quære*, Whether the Money might not better have been paid to the eldeſt Son?

this 650 *l.* being as yet actually but Money, it ſhould (as he urged) be looked upon only as Perſonal Eſtate.

But the *Maſter of the Rolls contra*; that this 650 *l.* ought to be taken as Land, and go to the Plaintiff (*a*) as Heir; the Diſpute in this Caſe being not betwixt the Party himſelf, the Father, and the Party who was to pay the Money, but betwixt the Heir and Executor, who became intitled to this Money ſubject to the Covenant; and it was the rather to be deemed a Real Eſtate, becauſe this was Part of the Marriage Agreement, and the Covenant was made in Conſideration of a Marriage and a Marriage Portion.

(*a*) Vide the Caſe of *Scudamore* verſus *Scudamore*. Preced. in Chan. 544. the like Determination by Lord *Parker*.

Wherefore the Court decreed that the 650 *l.* ſhould be brought before a Maſter for the Benefit of the Plaintiff (being an Infant) but would not decree it to be laid out in Land, becauſe if the Plaintiff ſhould die before ſuch Diſpoſition it would go to her Heir of Courſe.

Caſe 140. *Lord Chancellor* Parker.

Sir Robert Burdet verſus *Hopegood.*

One deviſes, in Caſe he leaves no Son at the Time of his Death, to *J. S.* The Teſtator dies leaving his Wife *privement enſient* with a Son; this Poſthumous Son is a Son living at the Teſtator's Death, and *J. S.* not intitled.

ROBERT *Burdet* Eſq; in the Life-Time of Sir *Robert Burdet* the Plaintiff's Grandfather, being ſeiſed in Fee of the Manor and Priory of *Modney* in the County of *Norfolk*, by his Will dated 17th *Dec.* 1711. deviſed the Premiſſes, *in Caſe he ſhould leave no Son at the Time of his Death*, to his Couſin *Francis Hopegood* and his Heirs, and as a Reward for the Trouble which the Teſtator had given him, and for the many Obligations he had to him, gave him all his Perſonal Eſtate, and made him Sole Executor and died, leaving his Wife *privement enſient*, which Child afterwards proved to be a Son the now Plaintiff.

And one of the Queſtions was, whether *Hopegood* the Deviſee was intitled to theſe Lands, in regard (as was objected) the Teſtator died without leaving a Son at the Time of his Death?

Hereupon *Lord Chancellor Parker* referred it to the Judges of the King's Bench, who were unanimouſly of Opinion, that the Plaintiff Sir *Robert*, though not born, had yet an Exiſtence in the Eye of the Law, as in *Ventre ſa Mere*, which in many Reſpects was regarded; as if a Woman takes Poiſon to kill her Child then in her Womb, and the Child is born alive, and afterwards dies of that Poiſon, the Woman is guilty of Murder (*a*); alſo a Child in *Ventre ſa Mere* may be vouched, and may be Deviſee, and it would be hard to diſinherit ſuch an only Child, nor could it be imagined the Teſtator ever intended ſo to do.

(*a*) Vide ante 246, *Beale* verſus *Beale*.

The Certificate of the Judges was as follows:

"We are of Opinion, that the Deviſe of the ſaid
" Manor and Priory of *Modney*, *&c.* to *Francis Hopegood* and his Heirs, was not an abſolute Deviſe, but
" ſubject to the Contingency of the Teſtator's leaving
" no Son at the Time of his Death. So that ſuch
" Contingency not happening, the Deviſe to the ſaid
" *Francis Hopegood* and his Heirs cannot take Place;
" the Teſtator, as we humbly conceive, having expreſſed no Intention in the Will of diſinheriting his only
" Son, the Conſequence of which is, that Mr. *Hopegood* is not intitled to the Premiſſes."

John Pratt, *Rob. Eyre*,
Litt. Powis, *John Forteſcue Aland.*

With which his Lordſhip agreed, and accordingly on the 5th of *October* 1721. decreed the Defendant *Hopegood* to deliver up Poſſeſſion of the Premiſſes and account for the Rents and Profits which he had received.

Pierpoint verſus *Lord Cheney.*

Caſe 141.

Lord Chancellor Parker.

Preced. in Chan. 503.

UPON the Marriage of the Earl of *Kingſton* eldeſt Son to the Marquiſs of *Dorcheſter* with *Rachel Bainton* the Niece of Mr. *Hall*, the ſaid *Rachel* had 2000 *l.* a Year in Land, and 20000 *l.* in Money, and the Earl of *Kingſton* being an Infant, the Settlement was made by a (*a*) private Act of Parliament, whereby (*int' al'*) the Manor of *Dale*, *&c.* in the County of *Lincoln*, being together with the Caſual Profits about 1000 *l. per Annum*, was ſettled upon the Marquiſs of *Dorcheſter* for Life, Remainder to his eldeſt Son the Lord *Kingſton* for Life, Remainder to Truſtees for 1000 Years, in Truſt that if it ſhould happen there ſhould be only one Daughter by the Marriage, ſuch Daughter ſhould have 20000 *l.* for her Portion at her Age of twenty-one or Marriage, and in the mean Time 300 *l. per Annum* for her Maintenance until the Age of twelve Years, and afterwards 400 *l. per Annum* until the Portion ſhould become due; the Maintenance, as well as the Portion, to be raiſed by the Truſtees either by the *Rents Iſſues and Profits*, or by *Sale* * *or Mortgage*;

Settlement wherein the Manor of *Dale* is ſettled to the Uſe of Grandfather for Life, Remainder to his Son the Huſband for Life, Remainder to Truſtees for 1000 Years for raiſing 20000 *l.* for a Daughter, if but one, payable at twenty-one or Marriage, and in the mean Time 300 *l. per Annum* for her Maintenance, and to be raiſed by Truſtees either by Rents and Profits, or by Sale or Mortgage, and to be paid quarterly; the firſt Payment to be made at ſuch of the uſual Feaſts, as ſhall next happen after the Father's Death. Father dies leaving one Daughter, and the Grandfather living. Bill prayed a Mortgage of the Reverſion for the Infant's Maintenance, but the Court ſtrongly inclined againſt it. (*a*) 9 Annæ.

---

* In the Report of this Caſe in Precedents in Chancery it is ſtated, as if by the Words of the Act of Parliament, this Maintenance Money was to be raiſed out of the Rents and Profits of the Term, and that the Plaintiff

Mortgage; the Maintenance to be paid quarterly, *and the firſt of the ſaid* Payments to be made *at ſuch of the four uſual Feaſts as ſhould next happen after the Deceaſe of Lord* Kingſton *the Husband.*

Lord *Kingſton* died leaving Iſſue by *Rachel* a Son (now Marquiſs of *Dorcheſter*) and a Daughter named *Frances*, and the Lord *Kingſton* the Huſband being dead about five Years, this Bill was brought for the 300 *l. per Annum* Maintenance Money, and to have it raiſed by *Sale or Mortgage*, in regard it could not be raiſed by the *Profits*, the Grandfather the preſent Duke of *Kingſton* being alive and having an Eſtate for Life in the Premiſſes.

For the raiſing of the Maintenance by Sale or Mortgage, it was urged that whenever the Maintenance or Proviſion for Children came in Queſtion, it always received the moſt favourable Conſtruction that might be: Nay ſometimes in favour of ſuch Proviſion, the Court had offered Violence even to the Words; and ſo it was done in the Caſe of *Gerrard* verſus *Gerrard* (*a*) where a Portion being ſecured to a Daughter upon a Truſt of a Term for Years payable at her Age of eighteen or Marriage, which ſhould firſt happen after the Death of the Father and Mother, in that Caſe the Portion was decreed to be raiſed for the Daughter at her Age of eighteen, though in the Life-Time of her Mother.

(*a*) 2 Vern. 458. and cited *ante* in the Caſe of *Butler* verſus *Duncombe*, 451.

And as this had been done in the Caſe of a Portion, ſo *a fortiori* it ought to be done for Maintenance which was more neceſſary than a Marriage Portion, in

Plaintiff was for having that extended to a Sale or Mortgage by an equitable Conſtruction only; whereas this is a Miſtake, the Words [[illegible] or Mortgage] being expreſly mentioned in the Act. And the Reader will obſerve that good Part of this Argument is founded thereon.

that a Child could not ſubſiſt without Maintenance or Bread, but might live without Marriage.

That the Hardſhip of raiſing a Maintenance by the Sale of a Reverſion was not now to be objected, in regard the Owners of the Eſtate, who could put what Hardſhips, Conditions or Terms they pleaſed upon it, had ordered the Maintenance to commence and be paid at the firſt quarterly Feaſt after the Father's Death, and to be raiſed by Profits, Sale or Mortgage; which muſt be underſtood by *Profits* if the Tenants for Life were both dead, or elſe by *Mortgage or Sale*, if either of the Tenants for Life were living; and where theſe Methods were by the expreſs Words of a Settlement preſcribed, it was blotting them out, it was making a new Settlement to object to ſuch Method of raiſing the Maintenance; for if theſe Words were not to take Place, it would be in vain to make Settlements; and Sir *Thomas Powis* quoted the Caſe of Lord *Herbert* decreed by the late *Maſter of the Rolls*, wherein the late Lord *Herbert* gave his Real Eſtate to his Nephew, ſubject to a Term for Years which was declared to be upon Truſt by Sale or Mortgage, or with the Profits, to raiſe 3000 *l.* a-piece for his two Siſters, and 100 *l. per Annum* Maintenance Money, and the Eſtate happened to be ſo incumbered with Jointures and Rent-Charges, that there was not enough to pay the Maintenance; upon which the Court decreed a Mortgage of the Term to raiſe it.

Mortgage of a Term decreed to raiſe Maintenance Money.

It was admitted that the raiſing of Money upon any Reverſion was indeed a diſadvantageous way of doing it: However, if it could not be raiſed any other way, it muſt be raiſed at a Diſadvantage.

On the other Side it was ſaid, that in any Caſe to ſell a Reverſion was prejudicial to an Eſtate; but to ſell a Reverſionary Intereſt for Maintenance Money was never known, nor could any Precedent be produced for it; eſpecially where it was a Matter intirely in the Diſcretion of the Court, and where the Child had a Mother ſo able to maintain it, a Mother who in this Caſe had 3000 *l. per Annum* Jointure.

Reverſion never mortgaged to raiſe Maintenance, where the Mother was able to keep the Child.

That it would be a Caſe of infinite Hardſhip to the Eſtate; for at this Rate there muſt be an annual if not a quarterly Mortgage, the Maintenance being to be paid quarterly, and in a Caſe too where the Intereſt could not be raiſed but muſt be made Principal, and this Intereſt muſt carry Intereſt, and all theſe Mortgages be liable to Forecloſures; that it would occaſion a plain Hardſhip even to the Daughter herſelf; for the ſame Fund which was to raiſe her Maintenance was alſo to raiſe her Portion of 20000 *l.* when ſhe ſhould come to Age or be married; and if the Intereſt were to break into it by the frequent Charges of annual Mortgages and loading the Eſtate with Intereſt upon Intereſt, it would then (not being 1000 *l. per Annum*) prove deficient for the raiſing the Portion wherewith the Daughter was to be married and preferred in the World.

Alſo, conſidering the Circumſtances of this Caſe, it ſhould be intended that this Maintenance Money was to be raiſed when the Term commenced, or upon the Death of the Father, by which the Term came into Poſſeſſion, ſo as to yield Rents and Profits, which was one of the Methods whereby the Maintenance was to be raiſed.

That at leaſt there could be no Colour to aſk for the whole 300 *l. per Annum*, but only for ſo much as it might be reaſonable actually to lay out in her Maintenance, regard being had to her tender Years.

To which it was replied, that the other Side were arguing againſt the expreſs Directions of the Act of Parliament, for the plain Words of it told both *how* and *when* the Maintenance was to be raiſed; how? by Rents and Profits, Sale or Mortgage; when? why the firſt Quarter Day after the Death of the Father.

That the Act of Parliament ſaying the Maintenance ſhould be raiſed by Profits, *Sale or Mortgage*, if it could not be raiſed by Profits, (becauſe but a Reverſion) it muſt neceſſarily be raiſed by Sale or Mortgage; that the Act expreſly ſaid ſo, the Parties intereſted in the Eſtate, and who had a Power over it had ſo ſettled it, and then it could be no Hardſhip when conſented to by all Parties; and this was now not a Matter diſcretionary, but *de Jure* and of Right, *ex Debito Juſtitiæ*, which the Court cannot refuſe, a Matter of Truſt being as much a (*a*) Right as a legal Intereſt, and it would be in vain to make Settlements if the plain Words of them were not to be obſerved, and from which, if a Deviation were to be once allowed, none would know how to give an Opinion thereupon; and as to the other Side's demanding Precedents, *they* ought to ſhew Precedents where a Settlement or Act of Parliament ever ſpoke ſo plain, and yet did not prevail.

(*a*) Vide poſt the Caſe of *Sandys* verſus *Sandys*, 707.

That as to the Charge of frequent and annual or quarterly Mortgages, it was near five Years ſince the Father's Death, and yet till now, no Mortgage had been demanded, and when a Mortgage was made it might be for ſo much as ſhould be ſufficient to maintain the Child for three or four Years, and in the mean Time Part of the Money raiſed might be put out.

And with Regard to the Argument, that this might hinder the raiſing the *Portion*, that might *never* happen to be due, whereas the Maintenance was *already* due. And to ſay, that what was *now* due, and for Maintenance too, ſhould not be raiſed, becauſe it might hinder what might *never* be due, was ſtrange arguing; indeed if the former was not to be paid, the latter was not likely to be ever due, for the Child muſt be ſtarved and never live to have her Portion.

Then as to the Mother's Jointure, though allowed to be large, it was however agreed and intended that the Mother ſhould have it clear; and yet ſhe maintained the Son, whoſe Education by reaſon of his great Birth muſt be very chargeable, and this was a Load upon the Jointure, in reſpect to which the more liberal Maintenance ought to be made to the Mother; as it was (*a*) uſual for the Court to allow a Parent the greater Maintenance for the Heir, when younger Children were left unprovided for.

(*a*) Vide 2 Vol. 22. *Harvey* verſus *Harvey*.

Infant's Good to be conſidered in raiſing of her Maintenance Money.

Lord Chancellor: I ſhall conſider the Infant's Good, and take Care that her Demand of Maintenance ſhall not defeat her other Demand of her Portion, it being one and the ſame Fund that is to provide both. It is a hard Caſe to mortgage a Reverſion, heap Intereſt upon Intereſt, and ſubject the Eſtate to a Foreclosure, for it may come to ſuch a Sum as that many Perſons may be under a Neceſſity of calling in their Money.

Though I admit I muſt take the Act as I find it, *viz.* the firſt Quarter-Day after the Death of the Father the Maintenance Money is to be raiſed by Profits Mortgage or Sale; yet this Court which is the Guardian of the Infant, muſt conſider the Good of the Infant, and it may be for her plain Benefit and a Kindneſs to her, that her Maintenance ſhould not be raiſed.

Wherefore let the Maſter ſee what is the Value of the Eſtate charged with the Maintenance and Portion, together with the Incumbrances that are upon it, and this will influence my Judgment.

In the mean while I cannot but obſerve that the Method propoſed by Mr. *Vernon* for raiſing at firſt more Money than there might be Occaſion for, to prevent frequent Mortgages, and to put out the Reſidue for which there ſhould not be a preſent Occaſion, would not anſwer the Inconvenience; for the Money thus raiſed, and for which the Eſtate would be loaded with Intereſt, muſt for ſome Time lye dead in the Maſter's Hands.

And as in the Caſe of *Corbet* and *Maidwell*, Lord *Cowper* declared he would not go beyond the eſtabliſhed Precedents in Caſes of that Nature, as taking it that the Court had already gone too far, ſo I for my Part ſhall obſerve the ſame Rule, not having been able to find one ſingle Precedent for mortgaging (*a*) a Reverſion for Maintenance, and what makes it ſtill leſs reaſonable to do ſo in the preſent Caſe is, that the Noble Duke the Grandfather has offered in Court to maintain both the young Marquiſs the Son and the Lady *Frances* the Daughter.

(*a*) Vide 2 Vol. 180. *Rowenhill* verſus *Demſey*.

Anonymus.

Caſe 142.

At the Rolls.

IN this Caſe (*int. al'*) it was ſaid by Sir *Joſeph Jekyll, Maſter of the Rolls*, that as all Legatees are on a Deficiency of Aſſets to be paid in Proportion, ſo if the Executor pays one of the Legatees, yet the reſt ſhall make him refund in Proportion; nay, if one of the Legatees gets a Decree for his Legacy, and is paid, and afterwards a Deficiency happens, the Legatee who recovered ſhall refund notwithſtanding, in Imitation of the Spiritual Court where a Legatee recovering his Legacy is made to give Security to refund in Proportion, if, &c.*

As Legatees are to be paid in Proportion, ſo if an Executor pays one Legatee, and there is not enough to pay all, the Legatee who is paid ſhall refund in Proportion; ſo if one Legatee recovers his Legacy in Equity, and there is not enough to pay the reſt, he ſhall refund; *ſecus* if the Defect of Aſſets ariſes by the Waſting of the Executor.

But if the Executor had at firſt enough to pay all the Legacies, and afterwards by his waſting the Aſſets occaſions a Deficiency, in ſuch Caſe the Legatee who has recovered his Legacy, ſhall not be compelled to refund, but ſhall retain the Advantage of his legal Diligence, which the other Legatees neglected by not bringing their Suit in Time, before the Waſting by the Executor; whereas if the other Legatees had commenced their Suit before ſuch Waſte committed they might have met with the like Suceeſs, *Et Vigilantibus non Dormientibus jura Subveniunt.*

This Caſe I put to Mr. *Vernon*, who was of the ſame Opinion.

---

* Vide 1 Vern. 26 & 93.

Caſe 143.
At the Rolls.
2 Vern. 764.

Turton verſus *Benſon*.

A Son on his Marriage is to have 3000 *l.* Portion with his Wife, and privately without Notice to his Parents (Father or Mother) that treated for the Marriage, gives a Bond to the Wife's Father to pay back 1000 *l.* of the Portion ſeven Years afterwards; this Bond void in Equity; and will not be made better by being aſſigned to Creditors.

MR. *Turton* Barriſter at Law treated for his marrying Mr. *Benſon*'s Daughter, and Mr. *Benſon* the Father propoſing to Mr. *Turton*'s Mother to give his Daughter 3000 *l.* Mr. *Turton*'s Mother, though ſhe at firſt thought it too little, yet afterwards came into the Match, and agreed to ſettle Part of her Jointure upon her Son *Turton* in Poſſeſſion, and in the Marriage Writings under the Hand and Seal of Mr. *Benſon* it was mentioned that his Daughter's Portion was to be 3000 *l.* but before the Marriage it was privately agreed betwixt Mr. *Turton* and Mr. *Benſon* that Mr. *Turton* ſhould give a Bond to Mr. *Benſon*, to pay back to him 1000 *l.* at the End of ſeven Years without Intereſt, of which Bond Mr. *Turton*'s Mother had no Notice.

The Marriage took Effect, and Mr. *Benſon* owing to Sir *Theodore Janſſen* 2000 *l.* aſſigned over Mr. *Turton*'s Bond to Sir *Theodore*, as an additional Security. Mr. *Benſon* died; Sir *Theodore*'s Demands were afterwards paid, and Mrs. *Benſon* the Widow and Adminiſtratrix of Mr. *Benſon* aſſigned Mr. *Turton*'s Bond in Truſt for the Benefit of Mr. *Benſon*'s Creditors who were many, and (as it was ſaid) more than his Aſſets could pay.

Mr. *Turton* brought his Bill to be relieved againſt this 1000 *l.* Bond, and *Benſon*'s Creditors a Croſs Bill to have the Benefit of it; the Cauſe had been greatly debated before the *Maſter of the Rolls* who relieved againſt the Bond by granting a perpetual Injunction thereupon.

His Honour declared that the Creditors of *Benſon* could not be in better Condition than *Benſon* himſelf; and as to Sir *Theodore Janſſen*, it was to be conſidered he had no legal Title to this Bond but only an equitable Aſſignment; and therefore having a Security which was not good in Equity, he could not be in a better Condition than *Benſon* himſelf was; that ſuppoſing a Man ſhould aſſign over a ſatisfied Bond as a Security for a juſt Debt, the Aſſignee could not ſet up this Bond in Equity, which being ſatisfied before could receive no new Force from the Aſſignment.

One having a Bond receives the Money due upon it, and afterwards aſſigns it for a valuable Conſideration as unſatisfied to another who has no Notice of the Payment, yet the Purchaſer can have no Avail of this Bond.

That it was incumbent on any one who took an Aſſignment of a Bond to be informed by the Obligor concerning the *quantum* due upon ſuch Bond, which if he neglected to do, it was his own Fault, and he ſhould not take Advantage of his own Laches.

And with Reſpect to what had been proved, that Mr. *Turton* had ſince his Father-in-Law *Benſon*'s Death promiſed to pay back Part of this Bond, or a Debt ſecured thereby, this was not to be regarded; Mr. *Turton*'s Offers made and not accepted ſignified nothing; that Lord *Cowper* had often (*a*) ſaid a Man ſhould not be bound by an Offer made during a Treaty which afterwards broke off, or upon Terms that were not accepted.

(*a*) Vide the Caſe of *Harman* verſus *Vanhatton*, 2 Vern. 717.

That in Caſes of this Nature, not only the Plaintiff himſelf who gave the Bond, but the Father or Parent treating the Match would be intitled to Relief; as for Inſtance, ſuppoſe a Parent were to ſettle Land upon the Marriage of his Son, and the Son ſhould privately agree to pay back Part of the Fortune, the Parent in that Caſe would be relieved againſt ſuch Agreement.

But more particularly in the principal Caſe, there having been an underhand Agreement made with the Plaintiff without the Privity of his Mother, and after the Plaintiff's Affections were ſettled, (which was taking Advantage of the Paſſions of Mankind) the *Maſter of the Rolls* decreed the Plaintiff ſhould be relieved and the Bond delivered up.

Lord Chancellor Parker.

From this Decree there was an Appeal to *Lord Chancellor Parker*, who in *Michaelmas* Term 1719 affirmed it, ſaying that theſe private Agreements obtained from the intended Husband without the Privity of his Parent were highly to be diſcouraged. That

1*ſt*, That the Parties * themſelves to this Agreement were intitled to Relief, for ſo were all the Precedents; and if they ſhould not there would often be no Redreſs at all againſt the Fraud nor any Body to ask it.

And 2*dly*, the Parent as a Purchaſer of the Portion to his Child, by ſettling Lands, or beſtowing a pecuniary Advancement upon him on his Marriage, muſt alſo be relieved.

That it was no Argument to ſay *Turton* was in Fault; for admitting that were true, what Reaſon was there that *Benſon* who was in Fault alſo, ſhould be excuſed? And when *Benſon* had been guilty of this Fraud to *Turton*'s Mother, it was not reaſonable that any Act done by himſelf ſhould ſhelter him, for by this

2

---

* In the Caſe of *Roberts* verſus *Roberts*, *Trin.* 1730, *At the Rolls*, Secret Agreements and underhand Bonds on a Marriage were ſet aſide, though at the Suit of the Husband that made them, and there it is ſaid *per Cur'* that this perhaps may be the only Caſe, where a Perſon though *particeps Criminis* ſhall yet be allowed to avoid his own Acts.

this Means *Benſon* by his own Act would be too hard for the Court.

As to *Benſon*'s pretended Aſſignment of the Bond, it was upon no Conſideration, but if it were, yet in Truth it was not an Aſſignment, but an Agreement only that the Aſſignee ſhould have all the fair and equitable Advantage and Benefit of the Bond that the Aſſignor himſelf was intitled to; and if nothing was due, nothing could be aſſigned over. Not that this Bond given by *Turton* was ſo abſolutely void, as that it might not upon ſome new Conſideration or deliberate Act have been made good, but no ſuch Act appeared.

And with Regard to what Mr. *Turton* ſaid to *Richardſon* (who it ſeems was one of Mr. *Benſon*'s Creditors, and had joined in a Bill againſt Mrs. *Benſon* in order to have the Benefit of the Bond) that he would not ſet aſide his Bond, it was indeed generous, but no more than *nudum Pactum*.

Alſo as to what had been urged, that the Creditors of *Benſon* were numerous and in Danger of loſing their Debts through a Deficiency of Aſſets, that could be of no Weight, for ſtill the Creditors of *Benſon* muſt be paid out of *Benſon*'s Eſtate and not out of the Eſtate of *another* Man; and where it is ſaid that Creditors ought to be favoured, this muſt be meant with Regard to the Teſtator's Aſſets, not to any Effects which the Teſtator has wrongfully taken away or tortiouſly poſſeſſed himſelf of belonging to another.

Therefore affirm the Decree.

Caſe 144.

At the Rolls.

Tiſſen verſus *Tiſſen.*

One deviſes his Perſonal Eſtate to his Son, and if his Son die within Age and without Iſſue, then the Perſonal Eſtate to go to the Teſtator's Brother; the Son ſhall have the Produce of the Perſonal Eſtate, and only the Capital, in Caſe of the Infant's Death, &c. ſhall go to the Brother.

FRANCIS *Tiſſen* the Elder had four Sons, *Francis*, *John*, *William* and *Samuel*, and by his Will dated the 19th of *Auguſt* 1720 gives ſeveral Lands of conſiderable Value to his three younger Sons ſeverally at their reſpective Ages of twenty-four Years, and appoints that none of his ſaid three younger Sons ſhall take any of the Rents and Profits of the Eſtates thereby to them deviſed, until they ſeverally attain the Age of twenty-four Years, but that his eldeſt Son *Francis* (who was his Executor) ſhall take the Rents and Profits of the ſaid ſeveral Eſtates to his own uſe, until the Teſtator's ſaid three younger Sons ſhould attain their ſeveral Ages of twenty-four. Soon after this the Teſtator dies.

One deviſes Land to his younger Sons at twenty-four, and in the mean Time the Rents and Profits of the Premiſſes to his eldeſt Son and dies, and the eldeſt Son deviſes all thoſe Rents and Profits of the Premiſſes to his younger Brothers, but not to be paid to them until twenty-four, and dies leaving his younger Brothers under twenty-four; only the Rents and Profits accruing from the Death of the elder Brother the Teſtator ſhall paſs.

28th *October* 1717. *Francis Tiſſen* the Son makes his Will, and thereby gives all his Perſonal Eſtate and the Produce thereof (his Debts, Legacies and Funerals being paid) to the Child his Wife was then *enſient* with; if one Son, then to ſuch Son, his Executors Adminiſtrators or Aſſigns, and if more than one Son, and the firſt Son ſhould die before twenty-one or Marriage without Iſſue, then his Perſonal Eſtate to go in Succeſſion to the Sons of his Body; but in Caſe there ſhould be no ſuch Son, or all ſuch Sons ſhould die before twenty-one or Marriage without Iſſue, then he gives it to his Executors and Adminiſtrators, and intails all his real Eſtate on ſuch Son and his Iſſue Male, and in Default of ſuch Iſſue, to his ſaid three younger Brothers ſucceſſively, with Remainder to his own Right Heirs.

Alſo the ſaid *Francis Tiſſen* the Son, by his Will, reciting his Father's Will as to the Deviſe to the three younger Sons, and that he the ſaid eldeſt Son (the now Teſtator) ſhould take the Rents and Profits to his own Uſe until his three younger Brothers ſhould come to twenty-four, now deviſes to his ſaid three younger Brothers reſpectively *all* the Rents and Profits of their reſpective Eſtates ſo deviſed to him by their ſaid Father until their reſpective Ages of twenty-four, but not to be paid them until twenty-four; and leaves his three Brothers *John*, *William* and *Samuel* Executors, and ſoon after dies.

The Widow of *Francis Tiſſen* the Son was afterwards delivered of a Son the Plaintiff *Francis Tiſſen* the Infant, who now brought this Bill for an Account, and to have Directions touching his Father's Eſtate.

And the Cauſe coming on to be heard before the *Maſter of the Rolls*, he decreed that no more than the Principal Money of the ſaid Teſtator *Tiſſen* [the Son's] Perſonal Eſtate ſhould go over to the Teſtator's three younger Brothers, in Caſe the Plaintiff the Infant ſhould die under Age and unmarried without Iſſue; and declared that the Intereſt which ſhould be made of this Principal Money did belong in all Events to the Plaintiff the Infant Grandſon, and ſhould be placed out from Time to Time for his Benefit.

And as to the Eſtates deviſed by *Tiſſen* the Father's Will, the Profits whereof the Teſtator had given to his eldeſt Son *Francis* for his own Uſe, and without Account until the younger Sons ſhould reſpectively attain their

Ages of twenty-four Years, and which *Francis Tiſſen* the Son gave to his ſaid three younger Brothers, it was declared by the Decree that theſe Rents and Profits were to commence only from the Death of the Plaintiff the Infant's Father, and not from the Death of *Francis Tiſſen* the Grandfather.

Upon this Cauſe's being brought by Appeal before *Lord Chancellor* (*a*) *Parker*.

(*a*) Jovis 11 *Decem.*

1*ſt*, It was objected that in Caſe of the Death of *Francis Tiſſen* the Grandſon under Age unmarried and without Iſſue, by the Will of *Francis Tiſſen* his Father not only the Principal Money but alſo all ſuch Profits as ſhould be made thereof in the Grandſon's Life-Time, ſhould go to the Appellants *John*, *William* and *Samuel* the Uncles; for the Deſign was to amaſs an Eſtate together, and when he gave his Perſonal Eſtate with the Produce of *it* to the Son that his Wife was then *enſient* with, and if no Son, or if that Son ſhould die before twenty-one or Marriage, and without Iſſue, then he gave it to his Executors, the Word [it] comprehended the whole Legacy given to his Son, and imported as well the whole Produce of the Perſonal Eſtate as the Perſonal Eſtate itſelf.

But *Lord Chancellor contra:* The Son ſhall have the Profits to himſelf, but the Perſonal Eſtate, *i. e.* the whole Capital Stock ſhall go over in Caſe of the Son's Death unmarried without Iſſue, and under twenty-one. Anciently the Notions were that a Perſonal Thing given to one for Life or even for a Day was a Gift for ever, and would not bear a Limitation over; but the Conſtruction has ſince been that ſuch Deviſe paſſes only the Uſe and Profits and not the Thing itſelf *, and ſo it is made good that way. But in this Caſe even the Uſe

and

---

* See the Caſe of *Hyde* v. *Parrat* ante 6. and *Upwell* v. *Halſey* poſt 652.

and Profits are denied to paſs notwithſtanding what has been urged by the other Side; and it is the ſtronger becauſe the Word [Produce] is left out in the Limitation over, which ſhews a Variation of the Intention; and to make the Rents and Profits of an Eſtate to go over there ought to be very expreſs Words.

2dly, It was objected that the Teſtator *Tiſſen* [the Son] having by his Will recited his Father's Will, whereby the Father gave him the Profits of his younger Brothers Eſtates until their Ages of twenty-four Years, and reſtrained the younger Brothers (the now Appellants) from receiving the ſame until that Time; and *Tiſſen* the Son deviſing all thoſe Profits to his younger Brothers reſpectively; this paſt the Profits taken by himſelf even from his Teſtator's Death; and that the Teſtator the Son did this the rather, as being ſenſible it was a Hardſhip upon his Brothers that they ſhould have but 50 *l. per Annum* a-piece until twenty-four and therefore the Will of the Son was a *Renunciation* of the Bequeſt made to him by his Father.

Sed per Curiam: This Will can never be conſtrued to paſs the Profits which were before received by the Teſtator the Son, and which when received were properly no longer Rents and Profits, but paſſed into other Things; the Teſtator the Son could not intend to make himſelf a Debtor and Accountant to his younger Brothers for what he had before received, for if he had ſo intended he would have made uſe of plainer Words for that Purpoſe.

If a Man be poſſeſſed of a Term for Years and deviſes *all* his Term, this muſt be underſtood only ſo much of the Term as ſhall be to come at his Death, at which Time the Will begins to ſpeak and to take Effect;

One poſſeſſed of a Term for Years deviſes all the Profits thereof to *J. S.* only the Profits accruing from the Death of the Teſtator ſhall paſs.

Effect; and ſo here though the Deviſe is of *all* the Rents and Profits of the reſpective Eſtates, yet this cannot be intended to have any Retroſpect, but to operate only from the Death of the Teſtator.

Caſe 145. *At the Rolls.* Where there is a Decree *niſi Cauſa* againſt an Infant, on ſuch Infant's coming of Age, and before the Decree made abſolute, he may put in a new Anſwer.

Fountain verſus *Caine* and *Jeffs.*

ONE ſeiſed in Fee deviſes his Lands to his Wife for the Payment of his Debts and dies, leaving an Infant Daughter and Heir.

The Bill was brought by the Creditors for the Sale of the Eſtate, and the Infant Heir made a Defendant, who anſwers by Guardian, and the Eſtate is decreed to be ſold, the other Defendant *Jeffs* being a Purchaſer under this Decree, which as to the Infant Heir is only *niſi Cauſa*.

Afterwards and before the Decree was made abſolute, the Infant coming of Age moved the *Maſter of the Rolls* that ſhe might be at Liberty to put in a new Anſwer, and thereby ſet forth her Right to the Premiſſes, which (as it was alledged) was not fully done by the former Anſwer.

But the Counſel who moved it not being fully inſtructed, and his Honour thinking this Motion to be ſomewhat Special, ordered it to be moved again.

Accordingly at another Day the ſame Motion being made, the *Maſter of the Rolls* ſaid that he had been attended with a Caſe wherein his Predeceſſor (Sir *John Trevor*) upon a Petition *ex parte* only, made an Order that an Infant coming of Age might put in a new Anſwer; and that upon better Information he underſtood

ſtood it to be a Matter of Courſe, and that there was no other way than this for the Infant to ſet forth his Title which he ought to have an Opportunity of doing.

That there was no Reaſon why he ſhould be * bound by the Anſwer of his Guardian, for that would be, at the ſame Time that the Court gave him Liberty to ſhew Cauſe, to tie up his Hands from ſhewing Cauſe.

Carter verſus *Barnadiſton*.

Caſe 146.

One ſeiſed in Fee of the Manors of *A.* and *B.* mortgages *A.* for 4000*l.* and by Will charges all his Real Eſtate with Payment of his Debts, and deviſes *A.* to *C.* and *B.* to *D.* and dies; the Deviſee of *A.* ſhall compel the Deviſee of *B.* to contribute to pay the Mortgage on *A.* but if the Will proves void, then no Contribution.

SIR *Michael Armin* being ſeiſed in Fee of the Manors of *Pickworth* and *Willoughby* in *Com. Linc'* by his Will dated 30 *March* 1668 deviſed that in Caſe his Perſonal Eſtate and his Eſtate in *Orton* in *Com. Huntington* ſhould not be ſufficient to pay his Debts and Legacies (as in Fact they were not) then his Executors ſhould receive the Profits of his whole Real Eſtate for the Payment of his Debts and Legacies, and after thoſe ſhould be paid, he deviſed the Manors of *Pickworth* and *Willoughby* to his Uncle *Evers Armin* for Life without Waſte, and in Caſe his Uncle *Evers* ſhould have Iſſue Male, then to ſuch Iſſue Male and his Heirs for ever, and after the Death of the ſaid *Evers* in Caſe he ſhould leave no Iſſue Male, and after Debts and Legacies paid, he deviſed his Manor of *Pickworth* to his Nephew *Thomas Styles* in Fee, and that of *Willoughby* to his Nephew Sir *Thomas Barnadiſton* in Fee, and made the ſaid *Evers Armin*, Sir *Thomas Barnadiſton*, *Thomas Styles* and *Thomas Briſtow* Executors.

---

* Vide 2 Vol. 401. *Sir John Napier* verſus *Lady Effingham.*

Afterwards 11 *June* 1668. the Teſtator Sir *Michael Armin* mortgaged *Pickworth* to the Lady *Diana Holles* for the Term of 1000 Years, for ſecuring the Sum of 4000 *l.* and Intereſt, and in the *December* following died, leaving *Suſanna* and *Anne Armin* (the Daughters and Coheirs of his elder Brother Sir *William Armin*) his Heirs at Law.

It was admitted that the 4000 *l.* Debt due from Sir *Michael Armin* by Mortgage of *Pickworth* was one of the Debts charged by Sir *Michael*'s Will upon the Real Eſtate. And after the Death of Sir *Michael Armin*, *Evers Armin* one of the Executors and Deviſees in the Will of Sir *Michael*, entred upon the Premiſſes called *Pickworth* and *Willoughby*, and received the Profits applying them to his own Uſe, ſaving that he kept down the Intereſt of the Mortgage on *Pickworth*.

In *January* 1675. *Evers Armin* ſuffered Recoveries of both the Manors of *Pickworth* and *Willoughby* wherein he was Vouchee, which were to the Uſe of himſelf the ſaid *Evers Armin* and his Heirs, and at the Time when theſe Recoveries were ſuffered, both the Coheirs of Sir *Michael*, *viz.* *Suſanna* afterwards Lady *Bellaſis*, and *Anne* afterwards Counteſs of *Torrington*, were of Age and unmarried.

Afterwards *Evers Armin* made his Will dated 19th *Octob.* 1677. and deviſed his two Manors of *Pickworth* and *Willoughby* to his Grandſon *Armin Bullingham* and the Heirs of his Body, Remainder to his Grandaughter *Elizabeth Saunders* (now *Elizabeth Mortimer*) and her Heirs; and 2d *June* 1680 died, at which Time both the Heirs at Law were under Coverture; upon which Deceaſe of *Evers Armin* no Perſon for ſome Time entered upon *Pickworth*, but at length *Heneage* (the Aſſignee of Lady *Diana Holles*'s Mortgage) entered thereupon; and as to *Willoughby*, Sir *Thomas Barnadiſton* entered upon it immediately after *Evers Armin*'s Death, claiming the ſame by virtue of the Remainder limited to him by the Will of Sir *Michael Armin.*

2d *March* 1688. Sir *Thomas Barnadiſton* mortgages *Willoughby* to Sir *Richard Rothwell* for 4000 *l.* for the Term of 1000 Years, and gives a Statute in 8000 *l.* Penalty for the Performance of Covenants.

10th *Nov.* 1691. *Armin Bullingham* (the Deviſee of *Evers Armin*) entered upon the Manor of *Willoughby* claiming Title thereto, and put his Cattle into ſome Part of the Land, upon which enſued a Replevin and the Special Verdict, in 3 *Lev.* 431 and *Salk.* 224.

By Leaſe and Releaſe 7th and 8th *July* 1697. Sir *Thomas Barnadiſton* mortgaged the Premiſſes to Sir *Samuel Barnadiſton* and his Heirs, to ſecure 2000 *l.* and by the uſual Proviſo at the End of the Mortgage it was agreed that Sir *Thomas Barnadiſton* ſhould continue in Poſſeſſion till Breach of the Proviſo.

In *Jan.* 1697. the Suit was compromiſed between Sir *Thomas Barnadiſton* and *Armin Bullingham*, who in *Hillary* Term the ſame Year both joined in a Fine and Recovery of the Manor of *Willoughby*, in which they were both vouched, and the Uſe was declared that *Armin Bullingham* ſhould have a Rent-Charge of 250 *l. per Annum* in Fee-Simple iſſuing out of the Manor of *Willoughby* with Power of Diſtreſs, and the ſaid Manor therewith charged was limited to the Uſe of Sir *Thomas Barnadiſton* and his Heirs, which Recovery barred the Remainder in Fee limited to *Elizabeth Saunders* as to the Manor of *Willoughby*; but there was no Recovery ſuffered of the Manor of *Pickworth*.

In *Auguſt* 1701. Sir *Thomas Barnadiſton* died, leaving the Defendant Sir *Thomas Barnadiſton* his Son and Heir, the ſame Month alſo *Armin Bullingham* died without Iſſue; whereupon the Rent-Charge of 250 *l. per Annum* deſcended to *Nicholas Bullingham* his Couſin and Heir; and *Pickworth* was claimed by *Elizabeth Mortimer* Grandaughter and Heir of *Evers Armin* [and late *Elizabeth Saunders.*]

By Indenture of Bargain and Sale inrolled *Nicholas Bullingham* ſold and conveyed this Rent-Charge in Fee of 250 *l. per Annum* and the Arrears thereof, to *John Coppen* and his Heirs for 3500 *l.*

The Defendant *Samuel Barnadiſton* claimed by *meſne* Aſſignments the Mortgages made of *Willoughby* to Sir *Richard Rothwel* and Sir *Samuel Barnadiſton*, and the Statute Staple for 8000 *l.* for Performance of Covenants: Afterwards *Samuel Barnadiſton* and *Coppen* (the latter having commenced a Suit in Equity for the Recovery of his Rent-Charge by Reaſon of the Prior Incumbrance of *Rothwell*'s Mortgage) came to an Agreement and obtained a Decree by Conſent, by which the Manor of *Willoughby* was decreed to be ſold, and *Coppen* to be firſt paid 7000 *l.* (being the computed Value of the Rent-Charge and Arrears) and afterwards *Samuel Barnadiſton* was to be paid what was due to him.

The Plaintiff *Carter* claiming Title to *Pickworth* under *Thomas Styles* the Deviſee in Remainder, brought his Bill in *Eaſter* Term 1712. againſt all the Claimants, *viz.* againſt *Heneage* the Mortgagee, to have a Redemption of that Mortgage, and as againſt the Defendants *Mortimer* and his Wife, to controvert with them the

Right of Redemption of *Pickworth*, in regard *Mortimer* his Wife claimed *Pickworth* as Heir at Law of *Evers Armin*, and againſt *Coppen* and the *Barnadiſtons* who claimed Eſtates and Intereſts in *Willoughby*, to have a Contribution from *Willoughby* of its Proportion of the Debt of 4000 *l.* and Intereſt, and to reimburſe *Pickworth* what that had paid more than its Share, the Teſtator Sir *Michael Armin* having by his Will charged all his Real Eſtate with the Payment of his Debts.

On hearing this Cauſe 2 *March* 1714 before *Lord Chancellor Cowper*, it was decreed that as againſt *Mortimer* and his Wife, the Plaintiff *Carter* ſhould be admitted to a Redemption of *Pickworth*; and that as againſt the other Defendants he ſhould have a Contribution out of *Willoughby*, in order to reimburſe *Pickworth* what that had paid beyond its Proportion.

22d *May* 1717. on an Appeal of the Defendants *Coppen*, Sir *Robert Barnadiſton* and *Samuel Barnadiſton*, to the Houſe of Peers, the Lords upon taking the Advice of all the Judges were of Opinion, that neither the Appellants as claiming under *Evers Armin*, nor the Reſpondent *Carter* as claiming under *Thomas Styles*, had any Title; that the Executors of Sir *Michael Armin* had only a (*a*) Chattel Intereſt for Payment of Debts, that the Freehold was well veſted in *Evers Armin*, and that the Remainder to *Thomas Styles*, in Default of *Evers Armin*'s leaving a Son, was a contingent Remainder and conſequently barred by the Recovery ſuffered by *Evers Armin*, and therefore that the Plaintiff *Carter* claiming under that Remainder to *Styles*, had no Title, nor any Right to a Contribution out of *Willoughby*; where-

One deviſes Lands to his Executors for and until Payment of his Debts; this is but a Chattel Intereſt. One ſeiſed of the Manors of *A.* and *B.* deviſes theſe Manors to *C.* for Life, and if *C.* ſhall have Iſſue Male, then to ſuch Iſſue Male and his Heirs for ever, and if *C.* ſhould leave no Iſſue Male, then the Manor of *A.* to *J. S.* in Fee, and the Manor of *B.* to *J. N.* in Fee. *C.* ſuffers a Recovery of thoſe Manors; this will bar the contingent Eſtates limited to *J. S.* and *J. N.*

(*a*) Vide 2 Vern. 404.

(a) May 1717.

upon they (a) reverſed *Lord Cowper*'s Decree, but in their Decree of Reverſal declared, that this Reverſal ſhould be without Prejudice to the Right of the Heirs at Law of Sir *Michael Armin* or *Evers Armin* to have ſuch Contribution.

In 1712 *Suſanna* one of the Coheirs of Sir *Michael Armin* who was called Lady *Bellaſis*, and who had afterwards married *James Fortrey*, died without Iſſue, her Huſband *Fortrey* ſurviving; and *Anne* the other Daughter, who firſt married Sir *John Woodhouſe*, and afterwards Lord *Crew*, and after that Lord *Torrington*, ſurviving her Siſter the Lady *Bellaſis*, did by Deed of Bargain and Sale inrolled and by Deed of Feoffment convey the Manors of *Willoughby* and *Pickworth* to the Plaintiff *Carter* and his Heirs.

Whereupon the Plaintiff *Carter* brought a new Bill in Equity againſt the now Defendants as to *Pickworth*, to have the Right of Redemption betwixt him and *Mortimer* and his Wife ſettled; and if the Right of Redemption ſhould be decreed to *Mortimer* and his Wife, then to compel them to redeem *Pickworth* or to be foreclosed; and as to *Willoughby* (the Plaintiff *Carter* having now bought in the Right of the Teſtator Sir *Michael Armin*'s Heir at Law) that the Defendants who had been in Poſſeſſion thereof might account for the Rents and Profits, and that the Plaintiff *Carter* might have the Poſſeſſion of *Willoughby* delivered to him; or if it ſhould appear that his Title to *Willoughby* or any Part thereof was barred, that then the Plaintiff *Carter* might have a Contribution thereof from *Willoughby*, or ſuch Part thereof as was ſo barred, towards Satisfaction of the Debt of 4000 *l.* and Intereſt due on the Mortgage of *Pickworth*, and to reimburſe *Pickworth* what it had paid more than its Share.

This Cauſe had been often very ſolemnly debated before the *Maſter of the Rolls*, who on the 10th of *March* 1718. delivered his Opinion.

He held, as the Lords by the Aſſiſtance of the Judges had before reſolved, that the Remainders limited to Sir *Thomas Barnadiſton* and *Styles* were contingent Remainders, and deſtroyed by the common Recovery ſuffered by *Evers Armin*; and the Queſtion now being whether the Remainder in Fee was in Abeyance, or did deſcend to the Teſtator Sir *Michael*'s Heir at Law, *His Honour* thought that there could be no Queſtion, but that as by Feoffment and other Common Law Conveyances, the Remainder in Fee might be put into Abeyance (according to 1 *Inſt.* 342, 343.) ſo it might be alſo by a Deviſe.

Deviſe to *A.* for Life, Remainder to the Right Heirs of *J. S.* (who is then living) the Fee-Simple deſcends to the Heir at Law of the Teſtator till the Contingency happens.

That the Statute of Wills (32 *Hen.* 8.) enabled every Body ſeiſed in Fee of Lands to diſpoſe thereof by Will according to his Pleaſure; ſo that by that Statute the Teſtator might mould and diſpoſe of his Lands in what Manner and Form he thought fit, provided it were conformable to the Rules of Law.

And that if by a Common Law Conveyance, the Owner of Land might make contingent Remainders, and place the Fee in Abeyance, *a fortiori* might he do ſo, if he thought proper, by Will, for which he cited 2 *Mod.* 291, 292. *Taylor* and *Bidulph*'s Caſe, where C. J. *North* ſays, that a contingent Remainder may ariſe by Conveyance as well as by Will, and (ſpeaking of Deviſes) obſerves, that one may deviſe Lands to an Infant *in Ventre ſa mere*, and this will be good by way of Executory Deviſe; but (ſays Lord *North*) if an Eſtate be given to *A.* for Life, Remainder to the Right

Heirs of *B.* (which muſt be intended of a Deviſe, for he was ſpeaking of Wills for ſome Time before) in ſuch Caſe this is a contingent Remainder and void if *A.* dies during the Life of *B.* for that the Fee does not deſcend during the Life of *B.* to ſupport the contingent Remainder.

That as to the Caſes of *Plunkett* and *Holmes,* 1 *Lev.* 11. 1 *Sid.* 47. *Raym.* 28. and of *Pureſoy* and *Rogers,* 2 *Saund.* 380. 2 *Lev.* 39. 3 *Keb.* 11. (which were cited as in Point to prove the Fee deſcended to the Heir at Law, in Caſe of a Will, and was not in Abeyance) that of *Plunket* and *Holmes* was, where one ſeiſed of Lands in Fee deviſed them to his eldeſt Son *Thomas* for Life, and if his ſaid eldeſt Son *Thomas* ſhould die without Iſſue living at his Death, then to the Teſtator's other Son *Leonard* and his Heirs, but if *Thomas* ſhould have Iſſue at his Death, then the Fee to remain to the Right Heirs of the eldeſt Son *Thomas.* The Teſtator dies, after which the eldeſt Son *Thomas* enters and ſuffers a Recovery and dies without Iſſue; and the Queſtion being whether the Remainder limited to *Leonard* was deſtroyed, Adjudged that it was, and plainly it was ſo, becauſe it was a contingent Remainder; but that this Reſolution affected not the Principal Caſe, it only proved that the Recovery by *Evers Armin* barred the contingent Remainders limited to the Iſſue of *Evers Armin,* as likewiſe the contingent Remainders limited to Sir *Thomas Barnadiſton* and *Styles.*

That indeed in the above cited Caſe it was ſaid by ſome of the Judges, that the Reverſion deſcended to the Teſtator's eldeſt Son *Thomas,* until the Contingency happened; but there was no need of making this Point any Part of the Queſtion before the Court, and it ſeemed unneceſſarily and extrajudicially thrown

in,

in, for whether the Fee did, or did not deſcend to the Teſtator's Heir at Law (*Thomas*) ſtill the Recovery ſuffered by *Thomas* the Deviſee for Life muſt in either Caſe be an equal Bar to the contingent Remainder to *Leonard.*

But the Reaſon of their Opinion ſeemed to be, for that the Deviſe of the Fee in that Caſe, was to the Teſtator's Heir at Law, and where the Deviſe is to the Teſtator's Heir at Law, the Fee muſt deſcend, and ſuch Heir at Law will take by Deſcent.

It was true, as to the Caſe of *Purefoy* and *Rogers,* where *Sampſon Shelton* ſeiſed of Lands in Fee deviſes them to his Wife for Life, and if God ſhall bleſs her with a Son, and the Wife ſhall call that Son by the Teſtator's Chriſtian and Sur-name, then the Teſtator gives the Inheritance of this Land to ſuch Son after his Mother's Death, and if ſuch Son ſhould die before his Age of twenty-one, then to the Teſtator's right Heirs after the Death of his Wife; the Teſtator died, and his Wife married again, and it was held ſo plain by *Hale* C. J. that he would not permit *Saunders* to argue it, that the Reverſion in Fee in that Caſe deſcended to the Heir at Law of the Teſtator until the Son ſhould be born, and that when the Teſtator's Heir at Law having the Reverſion in Fee conveyed it to the Teſtator's Wife and her ſecond Huſband and their Heirs, and made that Conveyance before the Birth of the Wife's Son by the ſecond Marriage, it muſt deſtroy the contingent Remainder: All that might be allowed to be Law; but ſtill it differed from the Principal Caſe; becauſe in the Caſe of *Purefoy* and *Rogers,* the Deviſe was to the Teſtator's right Heirs, (he admitted it was ſaid if ſuch Son as his Wife ſhould have by her ſecond Huſband ſhould die before twenty-one,) however it was a Deviſe by the Teſtator to his own right Heirs; and in all Caſes where the Deviſe is to the Heir at Law, the Reverſion deſcends to him; whereas in the Principal Caſe the Deviſe was not to the Teſtator's Heir at Law, no not upon any Contingency.

On the contrary, where the Deviſe was to *Evers Armin* for Life, and if he had Iſſue Male, then to ſuch Iſſue Male in Fee, and if he had no Iſſue Male, then Part of the Teſtator's Eſtate was deviſed to *Barnadiſton* in Fee, and the other Part to *Styles* in Fee; it was plain, that *Evers Armin* either muſt or muſt not leave Iſſue Male, and in either Caſe the Fee was equally given from the Teſtator's Heir, under whom the Plaintiff *Carter* claimed.

So that here was no Reverſion, Contingency, or Poſſibility that appeared to be left for the Teſtator's Heirs; he had ſhut the Door every way againſt them, whether *Evers Armin* ſhould leave Iſſue Male, or not.

That the Principal Caſe was much ſtronger than where the Deviſe is to *A.* for Life, Remainder to the right Heirs of *J. S.* becauſe in that Caſe *J. S.* might not die in the Life of *A.* and then the Teſtator's Heir would take, and ſo there might be ſomething ſaid, why in that Caſe the Reverſion ſhould deſcend until the Contingency one way or other falls out; but here the Teſtator expreſſed his Intention to give the Inheritance of the Premiſſes in all Events from his Heir at Law, whether *Evers Armin* ſhould leave Iſſue Male or not; and that the Contingency ſhould be only betwixt the Iſſue Male of *Evers Armin* and the Deviſees over, *viz.* *Styles* and *Barnadiſton*, and plainly deſigned no Contingency, Chance or Poſſibility to his own Heir.

Alſo the *Maſter of the Rolls* ſaid, that where one deviſes Lands to *A.* for Life, Remainder to the right Heirs of *J. S.* then living, though the Remainder in

Fee is in Abeyance, yet there is a Poſſibility left in the Heir, and that this was plain even in the Caſe of a Grant, 2 *Rolle*'s *Abr*. 418. *Pl*. 1, 2. and in 11 *H*. 6. 12. *b*. where a Grant is made to *A*. for Life, Remainder to the right Heirs of *B*. and *A*. dies living *B*. ſo that *B*. can have no Heirs, the Grantor ſhall have his Lands again for want of any other Perſon to take them.

And this Poſſibility ſeemed ſuch an Intereſt as intitled the Donor (*a*) to enter for the Forfeiture made by the Feoffment of Tenant for Life, for that his Eſtate was as much determined as it would have been by his Death; and it was abſurd, that Tenant for Life by an unlawful Act, *viz*. by deſtroying the contingent Remainder, ſhould gain to himſelf an indefeazible Fee-Simple; or like the Poſſibility that was upon a Grant at Common Law to a Man and the Heirs of his Body; for there, though the Grantor had no Reverſion, yet he (*b*) might enter when the Grantee died without Iſſue; and that

(*a*) See this Queſtion, *Littleton*'s Reports 159, 160.

(*b*) 1 Inſt. 19, 22.

Therefore in the Principal Caſe, when *Evers Armin* ſuffered a common Recovery by which his Eſtate for Life determined as much as by his Death, and by which the contingent Remainders were deſtroyed, ſuppoſing the Heir at Law of Sir *Michael Armin* the Teſtator might enter, it was however a diſputable Point and proper to be determined at Law; and there being no Incumbrance upon the Premiſſes to cover the ſame from an Ejectment, and it being a mere legal Title, the Court ſaid the Bill ſhould be retained for a Year, to the Intent that in the mean Time the Plaintiff might try his Title in an Ejectment; alſo in regard the Plaintiff (having purchaſed in the Title of the Heirs at Law) ſtood in their Place, and was therefore intitled to the Aid of a Court of Equity againſt the Defendants, and (*inter al'*) againſt the Defendant *Coppen*, he being a Purchaſer with Notice, *viz.* with Notice of Sir *Michael Armin*'s Will upon this Point in Queſtion; therefore in order to this Trial the Plaintiff was intitled to have all the Deeds and Writings produced.

The Plaintiff *Carter* being diſſatisfied with this Decree, appealed to *Lord Chancellor Parker*, upon which the Cauſe was heard before his Lordſhip, who at firſt ſent it to the Maſter to ſtate the Matter, and after it had come on upon the Report, and had held two Days Debate, his Lordſhip (*a*) delivered his Opinion.

(*a*) *Mich.* Term 1720.

The Reaſon of the Law why a Remainder in Fee is ſaid to be in Abeyance.

As to the Remainder in Fee being in Abeyance, or in the Cuſtody of the Law, or (as ſome call it) *in Gremio Legis*, his Lordſhip much expoſed that Notion, ſaying, the moſt reaſonable Inference from it was, that it ſhould be for the Preſervation of this Remainder; but ſince the conſtruing the Fee to be in Abeyance would on the contrary tend to the manifeſt Deſtruction thereof, and ſince nothing but Neceſſity in any Caſe ſhould occaſion the Fee-Simple to be in Abeyance; ſince the Diverſity taken by the * Books was between a Will and a Common Law Conveyance, and that in Caſe of a Will, where the Remainder was deviſed in Contingency, it was held that the Reverſion in Fee deſcended to the Heir at Law in the mean Time, and that whatſoever Eſtate was not diſpoſed of by the Teſtator, deſcended to the Heir, his Lordſhip ſaid he ſhould abide by that Opinion, and was very clear in it.

---

* *Quære tamen* upon what Foundation this Diſtinction between a Remainder created by a Conveyance, and one ariſing by Will, depends; ſince there does not appear to be any ſuch Difference taken in the Caſes of *Plunket* and *Holmes*, and *Purefoy* and *Rogers*.

That it was a ſtrange Conſtruction to take Pains by a Strain in Law, to place a Remainder in Fee *in Nubibus*, or in Abeyance, on Purpoſe that the Teſtator's Intention ſhould be wholly fruſtrated, and that the Tenant for Life might be under a Temptation to diſappoint the Will, by deſtroying the contingent Remainder by a Recovery or Feoffment, which in this Caſe muſt be admitted to be tortious Conveyances; nay, what was ſtill more extraordinary, that the Tenant for Life muſt be rewarded for this Wrong, and that he who before had but an Eſtate for Life, ſhould gain an abſolute and indefeaſible Fee-ſimple, and this by doing a wrongful Act, which would be to take Advantage of his own Wrong, both againſt Law and Reaſon.

That the Caſe of *Plunket* and *Holmes* was a Reſolution in Point, that where the Remainder in Fee was deviſed in Contingency, the Fee deſcended to the Heir until the Contingency happened; and though he ſhould admit that Reſolution to be extrajudicial, and not directly to the Point then in Queſtion, yet the Opinion of four learned Judges muſt be of great Weight, eſpecially againſt the Notion which was contended for by the other Side; and that the Caſe of *Pureſoy* and *Rogers* in 2 *Saunders*, was equally in Point, and the Interruption which Lord *Hale* gave to *Saunders* who attempted to argue this, did not proceed from any Heat, or Impatience, in Lord *Hale* (who was Maſter of a great deal of Temper, as well as Learning) but from the Reſult of his fixed Judgment and Opinion, that where after an Eſtate for Life the Remainder in Fee was deviſed upon a Contingency, the Fee-ſimple not being diſpoſed of until the Contingency happened, muſt in the mean Time deſcend to the Heir; and to ſay that in theſe Caſes of *Plunket* and *Holmes* and *Pureſoy* and *Rogers*, the Deviſe over of the Fee (after the contingent Deviſe in Fee) was to the Teſtator's Right Heirs, and that this diſtinguiſhed it from the Principal Caſe, and made the Heir take by Deſcent, was hardly agreeable to the Rules of Law, for when the Teſtator had deviſed the Remainder in Fee upon ſo remote a Contingency, having in that Manner given a Fee he could go no farther, nor deviſe any Remainder over, and therefore in ſuch Caſe the Deviſe over of the Fee-ſimple would be void, whether made to the Heir or to any other Perſon.

That theſe Deviſes to the Iſſue Male of *Evers Armin* in Fee if there ſhould be any Iſſue Male, or if there ſhould be none, then that *Willougby* ſhould go to *Barnardiſton* in Fee, and *Pickworth* to *Styles* in Fee, being made upon Contingencies that * never happened, it was the ſame Thing as if thoſe Deviſes had never been made, and conſequently the Reverſion in Fee deſcended to the Teſtator's Heir at Law.

One deviſes Lands to his Executors until his Debts paid, the Remainder over; the Executors miſapply the Profits, they ſhall hold only until they might have paid the Debts by the Profits, and after that, the Land is to be diſcharged, and the Executors only liable. Vide Salk. 153. accord.

Alſo as to what had been contended for by the Plaintiff's Counſel, that the Executors of Sir *Michael Armin* ſhould hold over, notwithſtanding they miſapplied the Profits and did not with them pay the Debts of Sir *Michael*:

He admitted that if any were to hold over, it muſt be the Executors of Sir *Michael*, who were the Deviſees of this uncertain Intereſt, until the Debts were paid; but it would be very ſtrange to ſay, that becauſe *Evers Armin* one of the Executors did not apply the Rents as he ought to have done towards Payment of the Debts, therefore and for that Reaſon, he that acted wrongfully ſhould hold over. This would be directly to let a Man take Advantage of his own Wrong,

---

* *Quære*, For the Contingency of *Evers Armin*'s dying without Iſſue Male actually happened.

Wrong, and was the ſame as to ſay, that the longer the Executors miſapplied the Profits, the longer they ſhould hold the Eſtate, nay, they ſhould hold it purely becauſe they did the Wrong.

That therefore this Term or uncertain Intereſt ſhould determine at ſuch Time as the Executors might have paid the Debts, if they had duly applied the Rents, *&c.* And as to the Profits miſapplied, the Creditors muſt purſue the Truſtees for ſuch Profits, and if the uncertain Intereſt of the Truſtees for the Payment of the Debts was become veſted by Survivorſhip in any third Perſon, ſuch Perſon was barred by Fine and Non-claim.

As to the Bar which was inſiſted on by the Defendant with regard to the Moiety of the Premiſſes by Means of the Fine levied by *Bullingham* and *Barnadiſton* in *Hill.* Term 1697, (for as to Lady *Bellaſis*'s Moiety it was allowed the Fine would be no Bar, Lady *Bellaſis* being then a Feme Covert, and ſhe having died a Feme Covert within five Years before the Commencement of the Suit) it had been objected, that *Partes finis nihil habuerunt*, in regard ſome few Months before the levying the ſaid Fine, Sir *Thomas Barnadiſton* who was ſaid to be the Diſſeiſor of the Premiſſes, did by Leaſe and Releaſe convey the Inheritance of the Premiſſes to Sir *Samuel Barnadiſton* in Mortgage, and though the former had the Poſſeſſion of the Eſtate, yet this was only under the Proviſo of the Mortgage, as Tenant at Will to the Mortgagee, until Default of Payment.

And it was ſaid, that ſince C. J. *Holt* in delivering the Reſolution of the Court in the Caſe of *Hunt* (a) and *Bourn* had declared, that if Leſſee for Years levied a Fine without firſt making a Feoffment, the Fine would be void as to the making of any Title by way of Non-claim, by Reaſon of the Imbecillity of his Eſtate, and that *Partes finis nihil habuerunt*, (with which Declaration of Lord *Holt*, *Lord Chancellor* agreeing) it was from thence inferred, that if where Leſſee for Years levied a Fine, it might be ſaid that the Fine was void, for that *Partes finis nihil habuerunt*, *à fortiori* it might be ſo ſaid in the Caſe of Tenant at Will's levying a Fine: But

---

(a) Salk. 340.

Fine levied by Leſſee for Years or at Will void; *ſecus* where by one having a defeaſible Right, and ſuch Leſſee joins with him.

Lord Chancellor held that in this Caſe it could not be ſaid that *Partes finis nihil habuerunt*; becauſe *Armin Bullingham* on the Death of *Evers Armin*, and as his Deviſee had a Right againſt all Perſons whatſoever but the Heir of Sir *Michael Armin* the Teſtator, and *Barnadiſton* entering upon him was a Diſſeiſor; and though *Barnadiſton* afterwards mortgaged the Premiſſes in Fee, yet he continuing in Poſſeſſion thereof, and joining with *Bullingham* in the Fine, it could not be ſaid that *Partes finis nihil habuerunt*, when one of them, *viz.* *Barnadiſton* had the Poſſeſſion, and the other of them, *viz.* *Bullingham* had the Right to the Land againſt *Barnadiſton*, and alſo againſt his Mortgagee.

Alſo his Lordſhip held that the Statute of Limitations barred the Plaintiff as to the whole; becauſe it was found by the *Maſter*'s Report that at the Time of the common Recovery ſuffered by *Evers Armin*, both the Coheirs of Sir *Michael Armin* were of Age, and unmarried.

Where Lands are deviſed to *A.* for Life, and if *A.* ſhall leave Iſſue Male, then to ſuch Iſſue Male and his Heirs for ever, and if *A.* ſhall leave no Iſſue Male, then to *B.* in Fee. If *A.* ſuffers a Recovery of theſe Lands and five Years paſs, the Right Heirs of the Teſtator are barred, in regard they ought to have entered upon ſuch Forfeiture and have no new Entry upon the Death of the Tenant for Life.

That upon this Recovery ſuffered by *Evers Armin* in 1675, he being but Tenant for Life, and the Coheirs having the Reverſion in Fee deſcended to them, they had a Right of Entry which then commenced, but had no new Right of Entry upon the Death of *Evers Armin*;

min; and that this was not like the common Caſe of Tenant for Life, with the Reverſion in Fee to *J. S.* where, it is true, the Reverſioner in Fee is not bound to watch after any (*a*) Forfeiture, he may ſtay till the Death of Tenant for Life; but here, the only Title which the Co-heirs could poſſibly have, muſt be by the Forfeiture of *Evers Armin*; for if there was no Forfeiture, then, upon *Evers Armin*'s Death, the Remainder muſt either go to the Iſſue Male of *Evers Armin* if any, or if none, to *Barnadiſton* and *Styles*, and ſo this Caſe differed from that of a bare Tenant for Life, Reverſion in Fee.

(*a*) Vide 3 Rep. 79. 1 Vent. 241.

Laſtly, as to the Contribution which the Plaintiff claimed out of *Willoughby*, in Reſpect of the Mortgage-Debt upon *Pickworth*, this the Court ſaid was intended by the Teſtator (Sir *Michael Armin*) for the Benefit of *Styles*, and related only to the Diviſion of Eſtate between *Styles* and *Barnadiſton*; but when the Will was diſappointed by the Recovery of *Evers Armin*, who thereby forfeited his Eſtate for Life, and barred both the contingent Remainders to *Styles* and *Barnadiſton*, and whereby the Co-heirs of Sir *Michael Armin* became intitled to both the Manors, ſo that they came into one Hand, the Right of Contribution was at an End; for a Man could not contribute to himſelf, and the Right of Contribution, as it was given by the Will, ſo was it in Force only while the Party claimed under the Will, and not where the Demand was ſet up in Defiance thereof.

All which Points his Lordſhip ſaid were to him pretty clear; however, if the Parties deſired that this Matter ſhould be made a Caſe upon the Maſter's Report, for the Opinion of the Judges, it ſhould go to the Judges of *C. B.* and that by this he did a Kindneſs to both Parties in ſaving them the Charge of a Trial at Bar, and of a long ſpecial Verdict, and the great

Length of Time that this would of Courſe take up, before they could come to have the Point argued*.

Caſe 147.
At the Rolls.

Anonymus.

Though the next Day after the laſt Day of the Term be not in Strictneſs Part of the Term, and therefore no Motion can then be made on the Petty-Bag Side; yet as to other Purpoſes it is Part of the Term, for which Reaſon a Motion made at that Time, to diſmiſs a Bill for want of Proſecution, on a Certificate that there had been no Proſecution within three Terms, of which the laſt Term was one, was denied.

A Motion was made the Day after the Term at the Rolls to diſmiſs a Bill for want of Proſecution, on a Certificate from the Six Clerk, that there had been no Proſecution within three Terms, of which the laſt Term was one.

And it was objected that this Motion came too ſoon; becauſe this next Day after the End of the Term was taken to be as Part of the Term, and Notices given of Motions the laſt Day of the Term were good to move at the Rolls the Day after; to which Sir *Joſeph Jekyll* the *Maſter of the Rolls* agreed and denied the Motion.

But Mr. *Vernon* ſaid the Day after the Term could not be taken to be Part of the Term, neither could there be any Motion made on the Petty-Bag Side on that Day, and the allowing of Motions to be made the Day after the Term on Notice to move the laſt Day of Term was only for Conveniency of Buſineſs, in regard there might not be otherwiſe Time to hear all the Motions; and it was ſaid by ſome of the Bar, that ſuch Motions had been uſually granted for diſmiſſing of Bills on the Day after the Term.

So where the laſt Seal continued three Days, and computing the third Day according to the Day of the Month, the Time would be expired for making a Report abſolute; yet this not ſo, it being only a Continuance of the firſt Day.

Agreeable to the above mentioned Order in *Hill. Vacation* 1721, when the laſt Seal laſted three Mornings,

---

* It appears from Lord *Macclesfield*'s Notes, that this Caſe was ſoon after compromiſed by the Parties.

and computing the third Morning according to the Day of the Month, it would be a proper Time to move to make a Report abſolute, (*viz.*) it would then be above eight Days after Service;

By *Maſter of the Rolls*, the Report cannot as yet, be made abſolute; for though this Seal laſts three Days, yet is it all only a Continuance of the firſt Day, and ſo the Time not yet out *.

Anonymus.

J. S. who was his Majeſty's Reſident at *Tunis*, commenced a Suit againſt *J. N.* at Law, and *J. N.* having brought a Bill in Equity againſt *J. S.* obtained an Order to ſerve the Attorney at Law of the Defendant in Equity, and that ſuch Service ſhould be good. And now the Defendant in Equity moved that his Attorney ſhould anſwer for him, and that ſuch Anſwer might be taken without Oath, foraſmuch as no Commiſſion could be ſent to *Tunis*, and it was the ſame as if the Defendant in Equity lived in an Enemy's Country.

Caſe 148. *Lord Chancellor* Parker. *A.* being beyond Sea ſues *B.* at Law, *B.* brings a Bill in Equity againſt *A.* Court will order that Service on the Defendant's Attorney at Law ſhall be good Service, but not that ſuch Attorney ſhall put in an Anſwer without Oath. *Qu.* if the Defendant was in an Enemy's Country where no Commiſſion could go to take the Anſwer.

Cur': The Plaintiff is intitled to a Diſcovery, and an Anſwer without Oath is nothing; beſides the *Engliſh* have a Conſul at *Tunis*, and Commiſſions have gone there by way of *Legborn*; wherefore deny the Motion.

If there had been a general Letter of Attorney to one to appear in and defend Suits, the Court would have ordered ſuch Attorney to appear for the Principal, and that Service on him ſhould have been good Service.

---

* The like Determination by Lord Chancellor *King*, in 1730.

DE

Term. S. Hillarii,

1718.

Caſe 149. *Lord Chancellor* Parker. In the Court's Allowance of a Maintenance out of a *Jew*'s Eſtate, to his Daughter turned Proteſtant, not material, tho' the Daughter be above forty Years of Age, or married, or tho' the *Jew* be dead.

Vincent verſus *Farnandez.*

A *Jew* had a Daughter who turned Proteſtant, the *Jew* had a very conſiderable Perſonal Eſtate, and dying in *May* laſt, after having by his Will left ſeveral Charities, and given his Perſonal Eſtate from his Daughter to his Executor, the Daughter who was married and forty-four Years old, petitioned Lord Chancellor for a Maintenance upon the Statute of the firſt of Queen *Anne*, *cap*. 30. intitled an Act to oblige the *Jews* to maintain and provide for their Proteſtant Children, whereby it is enacted, "That if any "*Jewiſh* Parent, in order to compel his Proteſtant "Child to change his or her Religion, ſhall *refuſe* to al"low ſuch Proteſtant Child a fitting Maintenance ſuit"able to the Degree or Ability of the Parent, and to "the Age and Education of ſuch Child, upon Com"plaint to the Lord Chancellor or Lord Keeper, *&c.* "It ſhall be lawful for the Lord Chancellor, *&c.* to "make ſuch Order for the Maintenance of ſuch Pro"teſtant Child, as he or they ſhall think fit.

And it was objected that this Caſe was not within the Act, for that

Firſt, This Child is above forty Years old, and ſo the Care of her Education over.

Secondly, She is married, and not now to be called a *Child*, but to be provided for by her Husband.

Thirdly, That the Parent being dead could not be ſaid to have *refuſed*, *&c.* and ſo the Power given by the Act at an End.

Lord Chancellor: I ſtrongly incline to think this Caſe within the Act upon the following Reaſons: The Petitioner is a Proteſtant Child of a *Jewiſh* Parent, tho' the Parent be dead. Suppoſe the Child of a *Jew* turns Proteſtant, and the *Jew* the Parent by Will gives his Eſtate to Truſtees, upon a Secret Truſt, that if the Child turn *Jew* the Child ſhall have the Eſtate, and not otherwiſe. As this would be clearly within the Miſchief, ſo every one muſt wiſh it to be within the Meaning of the Act. It is not ſaid the Complaint ſhall be againſt the *Father*, that would indeed take this Caſe out of the Act, neither is it ſaid, that the Order ſhould be made upon or againſt the *Father*, ſo that this Caſe fits every Word made Uſe of by the Legiſlature.

Suppoſe a Suit or Petition had been exhibited, and the *Jew* the Parent had died pending the Petition, and had given all away from his Proteſtant Child becauſe the Child had turned Proteſtant, doubtleſs the Complaint might be againſt the *Executor*, and the Order likewiſe againſt the *Executor*; every one will allow this to be a hard Caſe, and if the Words be large enough (as they are) why ſhould they not be conſtrued to extend to it?

Then as to the *Refuſal* of the Parent, it is not to be intended that the Parent the *Jew* muſt make an actual Refuſal *in Words*, for by that Conſtruction the Statute might eaſily be evaded, and rendered Uſeleſs. If the *Jewiſh* Father does by Will diſpoſe of all his Eſtate from his Child, this is in Law a Refuſal; and unleſs ſome other Reaſon be made appear, it ſhall be intended, becauſe the Child was a Proteſtant.

The Obligations of Nature plead ſo ſtrongly on Behalf of a Child, that when ſuch a Caſe happens, ſome great Provocation muſt be ſuppoſed to have occaſioned it, and if no other Reaſon be made appear, this Difference in Religion ſhall be intended the Reaſon.

Poſſibly theſe Charities given by the *Jew*'s Will may be under ſome ſecret Truſt for the Child if ſhe ſhould turn *Jew*, wherefore let all this be inquired into by the Maſter*.

Caſe 150.

At the Rolls.

L'Fit verſus *L'Batt.*

A Will is made in *French* and the Probate is in *Engliſh*, and varies from the Original; Probate being in a different Language is not concluſive.

THERE was a *French* Will, the Original whereof was proved in *French*, and under it in the ſame Probate the Will was tranſlated into *Engliſh*, but it appeared to be *falſly* tranſlated.

I Upon

---

* Though this was the Opinion of the Court, it does not appear that on this Petition the Court made any Order; and as nothing further is to be traced in this Matter, it is probable the Parties came to ſome Agreement.

Upon which it was objected, that the Tranſlation being Part of the Probate, and allowed in the Spiritual Court, it muſt bind; and the Application muſt be to the Spiritual Court to correct the Miſtakes in the Tranſlation, which until then muſt be concluſive.

But by the *Maſter of the Rolls*, nothing but the Original is Part of the Probate, neither hath the Spiritual Court Power to make any Tranſlation; and ſuppoſing the Original Will was in *Latin* (as was formerly very uſual) and there ſhould happen to be a plain Miſtake in the Tranſlation of the *Latin* into *Engliſh*, ſurely the Court might determine according to what the Tranſlation ought to be. And ſo it was done in this Caſe.

Biſhop of London verſus *Web.*

Caſe 151. *Lord Chancellor* Parker. Leſſee for Years *ſans* Waſte, Remainder in Fee to a Biſhop, Leſſee injoined from digging the Ground for Brick.

BISHOP *Bonner* in the Time of *Edw.* the 6th, being then Biſhop of *London*, made a long Leaſe of ſome Lands in *Ealing* in *Middleſex*, in which there are about twenty Years yet to come, and the Leaſe was made *without Impeachment of Waſte*, and the Defendant *Web*, in whom by ſeveral mean Aſſignments the Remainder of this Leaſe was veſted, articled with ſome Brick-makers, that they might dig and carry away the Soil of twenty Acres ſix Foot deep, Part of the Premiſſes, provided they did not dig above two Acres in the Year, and levelled thoſe Acres before they dug up others.

The Biſhop of *London*, having the Inheritance of the Premiſſes in Right of his Biſhoprick, brought a Bill to injoin the Digging of Brick in this Manor, alledging that this was carrying away the Soil, Part of the Inheritance, and would in Conſequence turn the

Paſture-Field into a Pit or Pond; that it was like the Caſe of *Vane* verſus Lord *Barnard* (a) where Lord *Barnard* having upon his Marriage ſettled *Raby* Caſtle (the Family Seat) upon himſelf for Life without Waſte, Remainder to his firſt, *&c.* Son of that Marriage, afterwards, upon ſome Diſpleaſure taken againſt his Son, employed ſeveral Perſons to pull down the Caſtle; upon which the Court granted a perpetual Injunction to ſtop him, and ordered him to amend and repair what he had pulled down; for that he ſhould not deſtroy the Thing itſelf, which he had expreſly ſettled. So in this Caſe, the Defendant, in digging all the Soil for Bricks, was actually deſtroying the Field.

(a) 2 Vern. 738. Salk. 161.

One in Conſideration of Marriage ſettles an Houſe to the Uſe of himſelf for Life *ſans* Waſte, Remainder to his Son, *&c.* The Tenant for Life ſhall not pull down the Houſe. Leſſee for Years *ſans* Waſte cannot pull down an Houſe, or the Trees that are a Defence or Ornament to the Houſe. Leſſee for Years *ſans* Waſte may open Mines.

But for the Defendant it was ſaid, that frequent Experience ſhew'd, that the Digging of Brick did not deſtroy the Field, there being many Fields about the Town where Brick had been dug, and thoſe Fields now uſed again for Paſture; but admitting it was Waſte, yet there being a Power to commit Waſte, the Leſſee might do it, as well as open a new Mine, and carry away the Mineral, without filling it up again.

On the other Side it was replied, that the Privilege of being *ſans* Waſte would not in Equity entitle one to pull down an Houſe, or even cut down Trees that are for the Ornament of the Houſe.

Lord Chancellor: Before the Statute of *Glouceſter*, Waſte did not lie againſt (*b*) Leſſee for Years, and the being without Impeachment of Waſte ſeems originally intended only to mean, that the Party ſhould not be puniſhable by that Statute, and not to give a Property

(*b*) 1 Inſt. 54.

Hard that Leſſee for Years *ſans* Waſte ſhould enjoy the Trees or Materials of the Houſe when he pulls them down, the Intention only being that the Leſſee for Years ſhould be as free from Waſte as he was before the Statute of *Glouceſter*.

in the Trees or Materials of an Houſe pulled down by Leſſee for Years *ſans* Waſte; but the Reſolutions having eſtabliſhed the Law to be otherwiſe, I will not ſhake it, much leſs carry it further.

But I take this to be within the Reaſon of Lord *Barnard*'s Caſe, where, as he was not permitted to deſtroy the Caſtle to the Prejudice of the Remainder-man, ſo neither ſhall the Leſſee in the preſent Caſe deſtroy this Field, againſt the Biſhop who has the Reverſion in Fee, to the Ruin of the Inheritance of the Church.

Let the Defendant carry off the Brick he has dug, but take an Injunction to ſtop further Digging.

Metham verſus *Duke of Devon.*

Caſe 152.
Lord Chancellor Parker.

One deviſes 3000 *l.* to all the natural Children of his Son by *Jane Stile*; the Baſtards born after making the Will ſhall not take; nay the Child in *Ventre ſa Mere* ſhall not take.

THE late Earl of *Devonſhire* deviſed three Thouſand Pounds *to all the natural Children of his Son the late Duke of* Devonſhire *by Mrs.* Heneage; and the Queſtion was, whether the natural Children by Mrs. *Heneage* born after the Will ſhould take a Share of the three Thouſand Pounds?

Lord Chancellor: They ſhall not; the Earl of *Devonſhire* could never intend that his Son ſhould go on in this Courſe, that would be to encourage it; whereas it was enough to pardon what was paſſed; beſides Baſtards cannot take (*a*) until they have gained a Name by Reputation, for which Reaſon, though I give to the Iſſue of *J. S.* legitimate or illegitimate, yet a Baſtard ſhall not take.

(*a*) 1 Inſt. 3. b. 6 Co. 68.

And though in the principal Caſe the Money was to be paid by the Executors, as the Teſtator by Deed ſhould appoint; and the Teſtator afterwards made the Deed of Appointment; the Deed of Appointment referring to the Will was held as Part of the Will.

But then it was ſaid, the Directions of the Will were, for the Executors to pay this 3000 *l.* as the Earl the Teſtator ſhould by *Deed* appoint, and the Earl afterwards by Deed appointed the 3000 *l. to all the Children of his Son* (the Duke) by Mrs. *Heneage*, ſo that this now depended upon the *Deed*, and therefore muſt refer to the Children born at the Time of the Execution thereof.

Tamen per Cur': The Deed referring to the Will is, as to this Purpoſe, to be taken as Part thereof.

Alſo it being a Queſtion, whether a natural Child *in Ventre ſa Mere*, of the Duke of *Devonſhire* by Mrs. *Heneage* ſhould take?

Lord Parker inclined that ſuch Child could not take for the Reaſon abovementioned, *viz.* for that a Baſtard could not take, until he had got a Reputation of being ſuch a one's Child; and that Reputation could not be gained before the Child was born.

Caſe 153.
Lord Chancellor Parker.

Babington verſus *Greenwood*.

Preced. in Chanc. 505. Jointure by a Freeman on his Wife in Bar of Dower will not bar the Wife's Cuſtomary Part; *ſecus* if ſaid to be in Bar of her Cuſtomary Part.

A Freeman of *London* on his Marriage covenanted to add 1500 *l.* out of his own Perſonal Eſtate to 1500 *l.* which was the Portion of his then intended Wife, and both theſe Sums were to be laid out in a Purchaſe of Land and to be ſettled upon the Husband for Life, and then to the Wife for her Life for her Jointure, and *in Bar of Dower*, with Remainder to the Children of the Marriage.

The Freeman makes his Will, and thereby (among other Things) gives a Legacy to his Wiſe, and dies leaving a Wiſe and Children.

Upon a Demand made by the Wiſe of her Cuſtomary Part, it was objected by Mr. *Mead*, that tho' a Jointure *of Land* made by a Freeman on his Wiſe in Bar of Dower, ſhould not bar the Wiſe's Cuſtomary Part, any more than it would bar her of her Share by the Statute of Diſtribution, (as in the Caſe of (*a*) *Atkins* verſus *Waterſon*, where the Court of Aldermen by the Recorder certified they had no Cuſtom extending to that Caſe;) Yet where the Jointure was to be made out of the Freeman's *Perſonal Eſtate*, and conſequently to leſſen the cuſtomary Part, ſuch a Jointure ſaid to be in Bar of Dower ſhould be intended *a full Proviſion*, and to be in Bar of *any other Proviſion*, conſequently in Bar of her cuſtomary Part; at leaſt, that there being a Legacy given by this Will to the Wiſe, ſhe ſhould not have both the Legacy and the cuſtomary Part, but muſt abide intirely by the Will, or by the Cuſtom, and that it had been carried ſo far by the late Maſter of the Rolls, as that where a Freeman of *London* deviſed a real Eſtate to his Wiſe, he decreed that even this would bar the Wiſe of her cuſtomary Part, and that ſhe ſhould not take both.

(*a*) 6 June 1716.

But *Lord Chancellor* held clearly, that a Jointure of Land made by a Freeman of *London* upon his Wiſe, if expreſſed to be in Bar of her cuſtomary Part by the Cuſtom of *London*, then it would be ſo; but if it were not ſo expreſſed, and only ſaid to be in Bar of her *Dower*, this would be no Bar of the Wiſe's cuſtomary Part; becauſe Land, or a Real Eſtate is of a quite different Nature from perſonal Eſtate, and a Matter wholly (*b*) out of

(*b*) Poſt in *Blunden* verſus *Barker*, 647.

of the Cuſtom of *London*; and as it had been admitted, that a Jointure of *Land* ſettled in Bar of Dower would no more bar the Widow of her cuſtomary Part, than it would exclude her from her Share by the Statute of Diſtribution, in Caſe her Husband ſhould die inteſtate, his Lordſhip ſaid, it was the ſame Thing in the principal Caſe, where a Freeman had covenanted to lay out of his own Eſtate 1500 *l.* in a Purchaſe and to ſettle it on himſelf for Life, Remainder on his Wiſe for Life for her Jointure; with Remainder to his Children.

1*ſt*, Becauſe from that Time the 1500 *l.* was not his own Eſtate, nor what the Cuſtom of *London* could meddle with; for a Man's own Eſtate is what he has beyond his Debts, and what he owes is *as alienum*, and the Cuſtom of *London* affects only what is beyond his Debts.

Land or Money covenanted to be laid out in Land not within the Cuſtom of *London*.

2*dly*, For that Money covenanted to be laid out in Land is, as to all Reſpects, Land in Equity, and would deſcend as Land for the Benefit of the Heir, and not go to the Executor; it might be intailed as Land, and had the other Qualities of Land, and conſequently was not within the Cuſtom of *London*.

Neither was this to be looked upon as breaking into the Cuſtom; for the Freeman might at any Time during his Life, even in his laſt Sickneſs, have inveſted his Perſonal Eſtate in the Purchaſe of Land, which would defeat the Cuſtom and ſtand (*a*) good, though the Freeman ſhould at the ſame Time have ſaid, that he did this on Purpoſe to defeat the Cuſtom. And as this (if the Purchaſe was real) would have held good to bar the Cuſtom, ſurely the Caſe could not be worſe, where ſuch Agreement for making the Purchaſe was for

(*a*) Poſt, *Frederick* verſus *Frederick*, 722.

for a valuable Conſideration; and Part of the Marriage-Articles.

Then as to the Legacy given to the Wife by the Freeman's Will, it appearing that this Legacy, together with all the other Legacies (for ſo it muſt be intended) did not * exceed the Husband's Teſtamentary Part, it was (he ſaid) the ſame Thing, as if theſe Legacies had been given by the Freeman expreſly out of his Teſtamentary Part, which he had full Power to diſpoſe of by his Will; and therefore this Legacy being no Ways inconſiſtent with the Cuſtom, the Wife might in ſuch Caſe take both; for it was only the inconſiſtency betwixt the Legacy and the Cuſtom that prevented the Widow or Child in any Caſe from taking both; the Conſequence of which was, that if the Freeman gave any Legacy out of his Teſtamentary Part, (the Wife or Child might (provided there was ſufficient) take both by the Will and by the Cuſtom, and therefore ſo might the Wife do here.

Where a Freeman leaves his Widow a Legacy, and there is ſufficient out of his Teſtamentary Part to pay the ſame, ſhe ſhall have her Legacy and Cuſtomary Part alſo.

When indeed the Freeman's Teſtamentary Part would not pay all his Legacies, there the Wife, if ſhe were a Legatee, ſhould not take her Legacy and her Cuſtomary Part alſo.

In the laſt Place his Lordſhip ſaid, it could never be maintained, that a Deviſe of a Real Eſtate by a Freeman to his Wife ſhould bar her of her Cuſtomary Part or prevent her from taking both, unleſs it were ſo expreſſed in the Deviſe; and that for this plain Reaſon becauſe the Deviſe of the Real Eſtate to the Wife no Ways leſſened or prejudiced the Cuſtomary

---

* *Quære autem* whether ſuch Legacy muſt not be given out of the Teſtamentary Part, as appears from the Reporter's Notes to have been determined in the Caſe of *Biddle* verſus *Biddle* about this Time. See alſo the Caſe of *Frederick* verſus *Frederick*, poſt.

Cuſtomary Part, nor was it any ways material to thoſe who were intereſted in the Cuſtomary or Orphanage Part, where the Real Eſtate went; ſo that there could be no Colour or Foundation for ſuch a Precedent, as Mr. *Mead* had cited from the Rolls.

In all which Points the Court was extremely clear.

Hughes verſus *Sayer*.

Caſe 154.

At the Rolls.

One having two Nephews *A.* and *B.* deviſes his Perſonal Eſtate to *A.* and *B.* and if either die without Children, then to the Survivor; this is good.

JOHN *Hughes*, after ſeveral Legacies, by his Will directed that the Surplus of his Perſonal Eſtate ſhould be divided by his Executors into ten Shares, three Shares whereof ſhould be paid to his Nephew and Niece, *Paul* and *Anne Hughes* Children of a deceaſed Brother, *and upon either of their dying without Children, then to the Survivor*, and if both ſhould die without Children, then to the Children of the Teſtator's other Brothers and Siſters.

The Queſtion was, whether this Deviſe over of a Perſonal Eſtate upon the Deviſees dying without Children was good or not?

And his Honour, having taken Time to conſider it, gave Judgment that the Word [Children] when unborn, had been in Caſe of a Will conſtrued to be ſynonymous with *Iſſue*, and therefore would in a Will create an Eſtate (*a*) Tail; and if the Word [Children] was underſtood to be the ſame with *Iſſue* in the preſent Caſe, then the Deviſe over of the Perſonal Eſtate upon a Death without Iſſue would be void; but that here the Words [dying without Children] muſt be taken to be *Children living at the Death of the Party.* For that it could not be taken in the other Senſe (that is) whenever there ſhould be a Failure of Iſſue, becauſe the immediate Limitation

(*a*) 6 Co. 17. *Wild*'s Caſe.

Limitation over was to the (*a*) *ſurviving Deviſee*, and it was not probable, that if either of the Deviſees ſhould die leaving Iſſue, the Survivor ſhould live ſo long as to ſee a Failure of Iſſue, which in Notion of Law was ſuch a Limitation as might endure for ever.

(*a*) Vide poſt, *Forth* verſus *Chapman*.

And therefore by Reaſon of the Limitation over in Caſe of either of the Deviſees dying without Children, then to the Survivor, the Teſtator muſt be intended to mean a dying without Children living at the Death of the Parent, conſequently the Deviſe over good.

Anonymus.

Caſe 155. Vide Vol. 2. Lord *Clifford*'s Caſe.

First Proceſs of Contempt againſt a menial Servant of a Peer of the Realm is a Sequeſtration *Niſi*.

MR. *Hale* moved for a Sequeſtration *Niſi*, for want of an Anſwer, againſt a menial Servant of a Peer of the Realm, as the firſt Proceſs for Contempt, in the ſame Manner as in the Caſe of the Peer himſelf; and though the Motion was granted by the Maſter of the Rolls, yet the Regiſter refuſed to draw it up, as thinking it againſt the Courſe of the Court.

Upon which Mr. *Hale* moved it again before the Lord Chancellor, who upon reading the Statute (*b*) granted the Motion likewiſe, it appearing to be both within the Meaning and Words of the Statute; and if it were not ſo, as it was plain no Attachment would lie againſt their Perſons, conſequently there would be no Remedy againſt them, and they would have a greater Privilege than their Lord, if the Proceſs againſt ſuch menial Servants were to be a Subpœna.

(*b*) 12 W. 3. cap. 3.

DE

Term. S. Trinitatis,

1719.

Caſe 156.

Winnington verſus *Foley*.

Lord Chancellor Parker.

In a Marriage Settlement Husband made Tenant for ninety-nine Years if he ſo long lived, Remainder to Truſtees during the Life of the Husband, &c. Remainder to the firſt, &c. Son by the Marriage in Tail Male, Remainder to the firſt, &c. Son of any other Wife, Remainder over.

UPON the Marriage of the Plaintiff Mr. *Winnington* who was eldeſt Son of Sir *Francis Winnington*, the Family Eſtate was ſettled upon the Plaintiff for ninety-nine Years if he ſhould ſo long live, Remainder to Truſtees during his Life, Remainder to the firſt, &c. Son of that Marriage in Tail Male ſucceſſively, Remainder to the firſt, &c. Son of any other Marriage, Remainder over.

A Son is born and of Age, the Wife dead, and there are no other Sons by ſecond Marriage; the Truſt for preſerving contingent Remainders deſcends to an Infant; if for the Benefit of the Family, Equity will decree the Infant Truſtee to join in a Recovery.

Mr. *Winnington* had by his Lady (who was dead) one Son, who was come of Age, and was in Treaty for a Marriage with one of the Daughters and Coheireſſes of the Lady *Read* of *Hertfordſhire*, and the Surviving Truſtee for preſerving contingent Remainders being dead, leaving an Infant Heir, the Father and

Son brought a Bill againſt the Infant Heir that he might join in making a Tenant to the *Præcipe*, in order to a Common Recovery for making a Settlement upon the Son's Marriage.

On the Hearing the Lord Chancellor declared, that the Truſtee being appointed to preſerve contingent Remainders, and here being a veſted Remainder in Tail, if this were for the good of the Family, he did not ſee but ſuch Truſtee might lawfully join.

But his Lordſhip referred it to the Maſter to ſtate whether this was for the Good of the Family.

The Maſter reported that the Son was in Treaty for the Marriage above-mentioned; that it was a beneficial Marriage for the Family, and that it was neceſſary a new Settlement ſhould be made of the Eſtate, which could not be done without a Recovery.

And now coming on upon the Maſter's Report, Mr. *Vernon* cited Sir *Thomas Tipping*'s Caſe (*a*) where the Father was Tenant for ninety-nine Years if he ſhould ſo long live, Remainder to Truſtees during the Life of the Father, Remainder to the firſt Son, *&c.* There was no Iſſue of the Marriage, and the Truſtees joined with the Father in deſtroying the contingent Remainders, which was held to be no Breach of Truſt.

(*a*) Stated *ante* in the Caſe of *Baſſet* verſus *Clapham*, 359.

Alſo he ſaid there was a later Caſe, where the Truſtee, *againſt the Conſent of the Father*, joined with the firſt Son the Remainder-Man in Tail in ſuffering a Common Recovery, and yet held to be no Breach of Truſt; for when ſuch Remainder was veſted in one of full Age, a ſubſequent Remainder was not to be regarded; neither was it Aſſets in Law or Equity.

Where a Remainder in Tail is veſted, ſubſequent contingent Remainders are not regarded.

Lord Chancellor: It might be greatly Miſchievous to a Family, if ſuch a Truſtee ſhould ſtand out and not join with the Father and Son, in cutting off the old Settlement and making a new one; this is plainly for the Benefit of the Family, for by the now intended Settlement the Son is to be but Tenant for Life, inſtead of Tenant in Tail; ſo that it is a Means of preſerving the Eſtate longer in the Family; alſo the Wife of Mr. *Winnington* the Father being dead, there is an End of the contingent Remainders by that Marriage; and as to any Remainders by another Marriage, no Remainder not *in eſſe* ought to be ſo much regarded as this Remainder in Tail, which is actually veſted in Mr. *Winnington* the Son.

Therefore let the Truſtee join with the Father and Son, in order to the Barring this, and making a new Settlement, and let the Maſter direct a proper Conveyance in which the Truſtee ſhall join.

Then it was inſiſted, that the Heir of the Truſtee (though an Infant) was yet a Truſtee within the Act (*a*) which enables Infant Truſtees to convey by Direction of a Court of Equity; and therefore it was prayed that the Infant Truſtee might levy a Fine, which muſt be good unleſs reverſed during his Infancy.

(*a*) 7 Annæ, cap. 19.

Sed per Cur': I do not know how I can direct the Judges or Commiſſioners to take a Fine from an Infant; but let the Maſter direct a proper Conveyance*.

---

* See this Reſolution affirmed by Lord Chancellor *King* in the Caſe of *Townſend* verſus *Lawton*, 2 Vol.

Hinton verſus *Pinke.*

Caſe 157.

Lord Chancellor Parker.

Legacy of 1500*l.* to be laid out in Land ſhall be taken as Land, but if a Deficiency of Aſſets, then not ſpecific, but ſhall contribute in Proportion. Specific Legacy is what veſts by Aſſent of Executor.

MRS. *Jane Pinke* by her Will bequeathed ſeveral pecuniary Legacies, and (*int' al'*) gave 1500*l.* to her eldeſt Son, in Truſt to lay it out in a Purchaſe of Lands in Fee, and to grant a Rent-Charge of 50*l.* *per Annum* thereout to his Daughter the Plaintiff *Mary*, the Wife of the Plaintiff *Hinton* for her ſeparate Uſe. But That if her ſaid eldeſt Son ſhould refuſe, or neglect to lay out 1500*l.* in a Purchaſe and grant this Rent-Charge, then he to have but 500*l.* of the Money, and the remaining 1000*l.* to be laid out in the Purchaſe of an Annuity, as far as it would go, for the ſeparate Uſe of the Daughter.

There being in this Caſe a Deficiency of Aſſets, the Queſtion was, whether the 1500*l.* Legacy, or at leaſt the 50*l.* a Year Annuity, ſhould abate in Proportion?

Objected it ſhould not; becauſe it was ordered to be laid out in Land, and ſo conſequently to be taken as a Deviſe of Land, by which Means it was become a ſpecific Deviſe, as had been decreed by Lord *Cowper* in the Caſe of *Burridge* verſus *Bradyl* (*a*), and as it was Land, it was of a different Nature, for it would deſcend to the Heir, *&c.*

(*a*) Vide ante 127.

Mr. *Vernon cont'*: The Legacy is Money; and if Money be deviſed to put one out an Apprentice, or an Annual Payment be deviſed out of a Perſonal Eſtate, theſe, on a Deficiency, ſhall abate in Proportion with the other Legacies.

Lord Chancellor: I agree this 1500 *l.* Legacy ſhall be taken as Land, but what the Legacy is, or how much is to be laid out in Land, is the Queſtion.

The Legatee of the 1500 *l.* cannot ſay he has a Right to the 1500 *l.* in Specie; indeed if the Money *in ſuch a Hand* were deviſed, this would be a ſpecific Legacy: A ſpecific Legacy is, where by the Aſſent of the Executor the Property of the Legacy would veſt.

Specific Legacy as it has in ſome Reſpects the Advantage, ſo in other Reſpects it has the Diſadvantage of a pecuniary Legacy.

As there is a Benefit one Way to a ſpecific Legatee, I mean, that he ſhall not contribute; ſo there is a Hazard the other Way; for Inſtance, if ſuch ſpecific Legacy (being a Leaſe) be evicted, or (being Goods) be loſt or burnt, or (being a Debt) be loſt by the Inſolvency of the Debtor, in all theſe Caſes ſuch ſpecific Legatee ſhall have no Contribution from the other Legatees, and therefore ſhall pay no Contribution towards them.

Is it poſſible, ſuppoſing there were in the Preſent Caſe 1500 *l.* of the Teſtator's Money laid upon the Table, that the Plaintiff the Legatee ſhould ſay, *I have a Right to this very Money in Specie?* If not, then it is no ſpecific Legacy.

But the Will ſaying that in Caſe of the Son's refuſing or neglecting to make this Purchaſe, then he is to have but 500 *l.* of the 1500 *l.* Legacy, and the Daughter to have the remaining 1000 *l.* therefore I take the Daughter to be a Legatee for 1000 *l.* which is to abate in Proportion, and as far as it will go, to be laid out in an Annuity for the Plaintiff the Daughter for her Life and for her ſeparate Uſe.

And

And *Lord Chancellor* ſaid, that though he could not come into the Reſolution of Lord *Cowper* in the Caſe of *Burridge* verſus *Bradyl*, yet if it were inſiſted on, he had ſuch a Regard for the Precedent as cited, that he would ſee the Decretal Order, but this not being inſiſted upon by the Client, it was decreed *ut ſupra*.

Litton verſus *Litton*.

Caſe 158. *Lord Chancellor* Parker. Intereſt for the Arrears of an Annuity from what Time.

LITTON *Litton* married *Bridget Moſtyn* with whom he had no Portion, but an Expectation of a Real Eſtate, her Father *Moſtyn* having a Real Eſtate and but two Daughters.

Litton Litton having no Iſſue by her, by his Will deviſed 500 *l.* a Year to his ſaid Wife for her Life, iſſuing *out of all his Eſtate*, and ſubject to that Annuity gave his Real Eſtate to the Plaintiff *Robinſon Litton*, made his Wife *Bridget* Executrix and reſiduary Legatee, and ſoon after died.

The Plaintiff *Robinſon* being Deviſee of the Real Eſtate which was a very large one, upon the Repreſentation (as was ſaid) of the Widow's Father, that the Perſonal Eſtate was very conſiderable, entred into Articles with the Defendant *Bridget*, that on her renouncing the Executorſhip, and delivering over the Perſonal Eſtate to the Plaintiff *Robinſon Litton*, he in Conſideration thereof would indemnify the Defendant *Bridget Litton* from all the Debts of the Teſtator, and pay her an additional Annuity of 40 *l. per Annum*; the 540 *l.* a Year was to be paid free from Taxes Half-yearly; and by theſe Articles the Defendant *Bridget* agreed to accept of a Security for the 540 *l.* a Year out of *Part of the Eſtate only*.

The

The Plaintiff *Litton* brought a Bill to be relieved againſt theſe Articles, as gained upon a Miſrepreſentation of the Value of the Teſtator's Perſonal Eſtate, which in Reality proved to be 4000 *l.* leſs than the Teſtator's Debts amounted unto, and the Widow brought her Croſs Bill for a Performance of the Articles.

But upon the Hearing of this Cauſe, it appearing that there was no falſe Inventory or Particular made of the Teſtator's Perſonal Eſtate by the Defendant *Bridget*, nor any Eſtimate given in of it, whereby the Plaintiff *Robinſon Litton* might be induced upon the Account of the Value of the Perſonal Eſtate to come into theſe Articles, and there being another Motive to the Plaintiff *Robinſon* to enter into the ſaid Articles, (*viz.*) the Defendant the Widow's accepting the Rent-Charge of 540 *l.* a Year out *of Part only of the Eſtate:*

Lord Cowper diſmiſſed the original Bill with Coſts, but as to the Widow's Bill ordered a Performance of the Articles, reſerving the Conſideration of Intereſt.

The Maſter reported 820 *l.* due for the Arrears of the Annuity, and thereupon Lord *Cowper* decreed Intereſt for the Arrears of the Annuity of 540 *l.* a Year *from the very Day of Payment*, and this Intereſt amounting unto about 80 *l.* *Robinſon Litton* appealed to Lord Chancellor *Parker*.

And it was argued that this was a voluntary Gift of an Annuity by Will, not as a Jointure before Marriage, nor as a Purchaſe, neither was there any Clauſe of Entry or *nomine Pœnæ* to intitle the Annuitant to Intereſt; that it could not be intended the Annuitant was to be paid at the very Day, but ſome Time was to be allowed; and if the Annuity were paid one Half-Year under another, it was ſufficient; for the Annuity was granted to iſſue out of the Land, and as the Rent of the Land muſt be admitted to be well paid if paid one Half-Year under another, ſo ought the Annuity iſſuing out of theſe Lands. That if an Action of Debt were brought for this Annuity, or a Diſtreſs made for it, the Plaintiff in ſuch Caſe would not at Law have recovered Intereſt; and why ſhould ſhe recover it in Equity, eſpecially when the now Plaintiff offered to pay the Intereſt from the End of Half a Year after the Annuity became due?

That according to the Rule of the Court, in the Caſe of an Annuity, though granted for a Jointure, the Intereſt ſhould be computed only from the Day when the ſubſequent Paymėnt after the Arrear incurred became due.

On the other Side it was inſiſted that this Annuity was the Widow's Bread, and it muſt be admitted to be due at the Day of Payment, from which Day the Party who was to pay this Annuity, by with-holding it in his own Hand did Wrong, and ought to anſwer Intereſt; at that Time the Widow might be neceſſitated to borrow Money, and if ſhe borrowed Money muſt pay Intereſt for it, conſequently if liable to pay Intereſt, ſhe ought by the ſame Reaſon to receive it.

An Annuity left the Wife by the Husband's Will, ſhall carry Intereſt from the Day on which it was payable, and not only from the ſubſequent Day of Payment after the Arrears incurred.

Cur': Intereſt is a Thing pretty much in the Diſcretion of the Court; and ſince Lord Chancellor *Cowper*, *that great Maſter of Equity*, who heard the Circumſtances and Merits of the Cauſe, appointed the Defendant Mr. *Robinſon Litton* to pay Intereſt from the very Day that it became due, and ſince this appears to have been the Widow's Bread, the Decree ſhall ſtand.

His Lordſhip added, he did not approve of the Diverſity that the Intereſt ſhould only be carried from the Half-Year after the Default of Payment; for ſuppoſing the Payment were but yearly, ſhould it carry Intereſt but from a Year after the Expiration of the Year, when what became due for this Annuity was all the Widow had to ſubſiſt upon?

Sed Quære as to this; for it ſeems the Arrears ſhould carry Intereſt only from the firſt Day of Payment next after the Arrears of the Annuity became due, if payable Half-yearly, then from the next Half-Year Day; if Quarterly, then from the next Quarter-Day, and ſo has been the common Rule in theſe Caſes; but the Hardſhip of the principal Caſe (though untruly ſuggeſted) and the Weight of Lord *Cowper*'s Decree before whom the whole Merits of the Cauſe were heard, ſeemed to influence the Court in this Matter.

Caſe 159. *Lord Chancellor* Parker. Precedents in Chancery 566. Executor has an expreſs Legacy, and ſo has the next of Kin, and no Diſpoſition of the Surplus; the Surplus decreed to be diſtributed.*

Farrington verſus *Knightly*.

ANthony *Upton* late of *Lincoln's Inn* Eſq; made his Will, by which (*int' al'*) he declared as to his Perſonal Eſtate (if he ſhould leave any) that he gave 50 *l.* thereof to his Brother *A.* 50 *l.* to his Nephew *B.* and made the ſaid *A.* and *B.* Executors, and gave 20*s.* a-piece to others of his Relations, ſeveral of whom were his Brothers, Nephews and Nieces, and as ſuch his next of Kin in equal Degree within the Statute of Diſtribution, after which the Teſtator abruptly broke off without ſaying, *In Witneſs whereof*, &c. or making any Diſpoſition of the Surplus, which amounted to about 1200 *l.*

---

* *Vide* the Caſes of *Rachfield* verſus *Careleſs*, the *Duke of Rutland* verſus *Ducheſs of Rutland* poſt, accord. *ſed vide* the Caſe of *Attorney General* verſus *Hooker* poſt, where Lord *King* was of a contrary Opinion, conceiving that where the Executor and next of Kin had each of them a Legacy, the undiſpoſed Surplus would by Law belong to the Executor, and he ſhould retain it.

All the Will was written with the Teſtator's own Hand, though not ſigned by him, and was proved in the Spiritual Court as his Will.

They who were in equal Degree of Kindred with the Executors brought this Bill to have their Shares of the Surplus, according to the Statute.

Mr. *Vernon* for the Plaintiffs: The Caſe which ſtands foremoſt in the Court upon this Head, is that of *Foſter* (*a*) and *Munt*, where expreſs Legacies were given to the Executors, and likewiſe to the next of Kin; and it was decreed ſuch Executors were but Truſtees of the Surplus for the next of Kin; for where a Legacy is given to an Executor, if he was to have the Surplus likewiſe undiſpoſed of by the Will, it would be giving him all and ſome.

(*a*) 1 Vern. 473.

Nay, It has been held in this Court, that where there were two Executors, and an expreſs Legacy was given to *one* of them only, this ſhould exclude them *both* from the Surplus; which is ſtronger than the principal Caſe where Legacies are given to *both* the Executors, and even in the Caſes of the *Ducheſs of* (*b*) *Beaufort*, (*c*) *Ball* verſus *Smith*, *Littlebury* verſus *Bulkley*, Proof was admitted to ſhew it to have been the Intention of the Teſtators, that though the Executors had expreſs Legacies, yet they ſhould likewiſe have the undiſpoſed Surplus; but it would have been altogether unneceſſary to prove ſuch Intention, if the Executors were of Courſe to have had the Surplus.

(*b*) Ante 114.

(*c*) 2 Vern. 675.

But further, this Caſe is the ſtronger, in as much as the Will is left imperfect without ſigning, and breaks off abruptly; whereas if the Teſtator had lived to finiſh

it,

it, it is not to be ſuppoſed but he would have provided for thoſe who were as near of Kin to him as the Executors themſelves.

On the other Hand Sir *Robert Raymond* for the Defendants admitted it to have been formerly the current Opinion, that where an expreſs Legacy was given to an Executor, and no Diſpoſition made of the Surplus, the Executor was but a Truſtee of ſuch Surplus for the next of Kin; but ſaid of late the Reſolutions had been otherwiſe; that accordingly it was ſo reſolved in the Caſe of *Ball* and *Smith* by Lord *Harcourt* on great Conſideration and View of all the Precedents; though it was true in that Caſe the Wife was Executrix. That to the ſame Effect was the Reſolution of the Houſe of Lords in the Caſe of the *Ducheſs of Beaufort*, and that of *Littlebury* verſus *Bulkley*.

And as to what had been objected, that unleſs the Executor ſhould be held a Truſtee of the Surplus, it would be giving him all and ſome; he ſaid where a Will gives the Executor an expreſs Legacy, it may well be intended by the Teſtator, that *in all Events* the Executor ſhall have his Legacy, although there ſhould come out to be no Surplus; but that if any Surplus ſhall remain, the Executor ſhall have that Surplus alſo. That the Teſtator by making one his Executor does thereby give him all his legal Intereſt in the Perſonal Eſtate.

That the Statute of Diſtribution could not take Place or have any Effect where there was a Will or an Executor; foraſmuch as that Statute operated only upon *Inteſtates Eſtates*, and the Party cannot be ſaid to die *Inteſtate* where he has made an *Executor*, and declared that *this is his Will*; and as the preſent Caſe was not within the Statute of Diſtribution, ſo, independent thereof of there could be no Diſtribution; and as often as the Spiritual Courts attempted to make any, the Courts at *Weſtminſter* (*a*) prohibited them.

(*a*) Vide ante, 7. *Petit* verſus *Smith*, and Vol. 2. *Edwards* verſus *Freeman*, 435.

Again, in making Diſtribution upon the Statute, it could not be doubted but the Spiritual Court had a concurrent Juriſdiction with the Court of Equity: Now in this Caſe there being an Executor, no Diſtribution could be made in the Spiritual Court. On the contrary,

This Will proved in the Spiritual Court, and appearing under the Seal of the proper Court which had the Juriſdiction thereof, it was now to be intended and looked upon as a compleat Will; and he cited a Caſe, where upon a Will which gave the Executor an expreſs Legacy, an inferior Court of Equity (I think that of *Cheſter*) was compelling the Executor to make a Diſtribution; but the Court of *C. B.* granted a Prohibition; alſo the Caſe of *Coleſworth* verſus *Brangwin* (*), where a Man made two Executors, giving only one of them a Legacy, and made no Diſpoſition of the Surplus; after great Conſideration had of the Point, *Lord Cowper* decreed the Surplus equally to both the Executors; and to the ſame Purpoſe was cited the Caſe of *Rawlins* verſus *Powel* (*b*). Beſides, that if an expreſs Legacy was to bar the Executor from having the Surplus, in this Caſe there being expreſs Legacies given alſo to the next of Kin, it was but juſt they ſhould be barred in like Manner.

(*b*) Ante 297.

In the laſt Place, as to the Caſe of *Foſter* verſus *Munt*, he obſerved that the Reſolution there was grounded

---

(*) Precedents in Chancery 323. ſaid to be decreed by Lord *Harcourt*. But there no Demand appears to have been made by the next of Kin; the Bill being brought by one Executor againſt the other.

grounded upon the Fraud made uſe of by the Executors in prevailing with their Teſtator to make his Will
(*a*) Ante 116. at a (*a*) Tavern.

Mr. *Vernon* in Reply: In *Foſter* and *Munt*'s Caſe there was not the (*) leaſt Proof of Fraud; neither ought any Will to be ſet aſide in Equity for Fraud, as was ſaid by the Lord *Cowper* in the Caſe of (†) *Goſs* verſus *Tracy*; for if the Teſtator be impoſed upon in the making of his Will, then it is not his Will.

(*b*) Precedents in Chancery 169.

He alſo cited (*b*) *Vatchell*'s Caſe, where one made two Perſons Executors, and gave them Legacies without diſpoſing of the Surplus; but as two of his Children were looked upon to be Baſtards, he gave them 20 *s.* a-piece in full Bar of all their Claim and Pretenſions to any Part of his Eſtate; and the late Maſter of the Rolls let both them and the reſt of the Teſtator's Children in for the Surplus of the Perſonal Eſtate, ſaying this was *Digitus Dei*; but in the Houſe of Lords upon an Appeal, though the other Children were allowed their Share of the Surplus, yet the two Sons to whom 20 *s.* a-piece was given in Lieu of their Claim, were not admitted to have any Share thereof.

Lord Chancellor: I do not take it to be a Rule, that a Will is not in any Caſe to be ſet aſide in Equity for Fraud; for I lately ſet aſide ſuch a Will for Fraud myſelf in the Caſe of one (**) *Bransby*; I mean, I decreed the Executor who gained the Will, to be but a Truſtee. An Executor from his Name is but a Tru-

---

(*) So ſaid alſo by Lord *Harcourt* in the Caſe of *Ball* verſus *Smith*, 2 Vern. 678. & *vide* Precedents in Chancery 567.

(†) Ante 287. *ſed Quære*, for the contrary ſeems to have been affirmed in that very Caſe by Lord *Cowper*.

(**) *Bransby* verſus *Kerridge*, decreed *November* 14, 1718. But this Decree was in *March* 1727 reverſed by the Houſe of Lords, and the Bill on which it was founded diſmiſſed.

ſtee, he being to execute his Teſtator's Will, and therefore called an Executor. In the preſent Caſe the Teſtator is not to be looked upon as dying Inteſtate, but to have made the Executor a Truſtee of the Surplus; and this is the Reaſon why the Spiritual Courts cannot compel a Diſtribution, *becauſe they cannot inforce the Execution of a Truſt.* Indeed in the Caſe of a Wife it has been held, that where ſhe is Executrix and has a Legacy, and there is no Diſpoſition of the Surplus, ſhe ſhall have it; but I do not hear any Precedents cited that go further. This differs from other Caſes, by Reaſon that the Will ſeems to be left incompleat. It had been natural for any Teſtator, (eſpecially for a Lawyer, as this was) to have ſaid, "In Witneſs whereof I have ſet my Hand." And this Will though it has a Date, yet it is not ſigned, nor has it the uſual Concluſion, ſo that (probably) if the Teſtator had not been interrupted, he would have gone on and diſpoſed of the Surplus; but as he has not done ſo, it ſeems to be left undiſpoſed of; for which Reaſon it ought to go according to the Statute of Diſtribution, as I think it would, if the Clauſe of a Will diſpoſing of the Surplus was raſed and become not legible: It is highly proper the Law ſhould be ſettled one Way or other in this Caſe, though no great Matter which Way, ſo it be but known. For me to ſay in this Caſe that the Executors ſhall have the Surplus, would be to make Way for reverſing Multitudes of Decrees which have ordered a Diſtribution of the Surplus in like Caſes, and occaſion great Confuſion. I will conſider of the Caſe, and be attended with Precedents, and will endeavour as far as I can to ſettle this Point.

Accordingly (*a*) ſome Time afterwards, each Party having attended the Lord Chancellor with Precedents, and his Lordſhip having taken Time to conſider of them, delivered his Opinion, that the Executors having

(*d*) June 10, 1721.

an expreſs Legacy of 50 *l.* each, ſhould be Truſtees of the Surplus of the Perſonal Eſtate for the next of Kin, according to the Statute of Diſtribution.

His Lordſhip took Notice of the Precedents with which he had been attended: And

Firſt, As to the Caſe of *Foſter* and *Munt*, the Decree in that was not founded upon the Fraud, but the Court declared that the Will excluded the Executors from the Surplus of the Perſonal Eſtate by having given them 10 *l.* a-piece for their Care and Pains; and the Teſtator by ſaying that the Executors ſhould have 10 *l.* a-piece for their Care, *&c.* plainly implied they ſhould have no more.

(*a*) Precedents in Chancery 81.

Secondly, *Earl of* (*a*) *Briſtol* verſus *Hungerford*, 9 *Gul.* 3. by Sir *John Trevor* Maſter of the Rolls, where there was an expreſs Legacy of 100 *l.* to the Executors without diſpoſing of the Surplus; and his Honour decreed, that this Legacy to the Executors created a reſulting Truſt of the Reſidue of the Perſonal Eſtate for the next of Kin.

(*b*) 2 Vern. 361.

Thirdly, (*b*) *Bayly* verſus *Powell* in 1698, by *Lord Sommers*, Legacies to all the next of Kin of the Teſtator, and a ſmall Legacy to the Executors; in that Caſe decreed the Executors to be Truſtees.

(*c*) 2 Vern. 425.

Fourthly, (*c*) *Randal* verſus *Bookey*, *January* 10. 13 *W.* 3. by Lord Keeper *Wright*, The Teſtator made his Wife Executrix, and gave her an expreſs Legacy; the Wife decreed a Truſtee of the Surplus, according to the Statute of Diſtribution.

(*d*) Precedents in Chancery 182.

Fifthly, (*d*) *Ward* verſus *Lant*, *Hill.* 13 *W.* 3. by Lord Keeper *Wright*, The Teſtator made his Wife Executrix to whom he gave ſome Legacies, and hereupon ſhe was decreed to diſtribute the Surplus.

So that as to what has been ſaid (*a*) heretofore, that there was but a ſingle Precedent of the Wife's being left Executrix and having an expreſs Legacy given her, wherein ſhe was declared to be but a Truſtee for the Surplus:

(a) By Lord *Harcourt* in the Caſe of *Ball* verſus *Smith.* Vide 2 Vern. 678.

Lord Chancellor ſaid he had now ſeen ſeveral of thoſe Decrees, and that they made no (*b*) Difference where the Wiſe and where a more remote Relation had the Executorſhip; for that ſtill in all thoſe Caſes, if there was no expreſs Diſpoſition of the Surplus, the Executor, whoever it was, had been looked upon but as a Truſtee, with Reſpect to ſuch Surplus, for the next of Kin.

(b) *Vide* the ſame ſaid by Lord *Cowper* in the Caſe of *Lady Granville* verſus *Ducheſs of Beaufort*, ante 115.

And his Lordſhip ſaid, that he had ſpoke with Mr. *Vernon* in his Life-Time * upon this Subject, who ſaid that there had been ſo many Decrees upon the Point where a Legacy was given to an Executor and no Diſpoſition of the Surplus, that the Executor was but a Truſtee of ſuch Surplus, and this Point had been thereby ſo fully eſtabliſhed, that he did not think it worth while to take Notice of any latter Decrees of this Nature; apprehending it to be a Principle as much fixed, as that Fee-Simple Land ſhould deſcend to the Heir.

His Lordſhip likewiſe took Notice of the Precedents which had been left with him by the other Side. As

Firſt, The *Ducheſs of Beaufort*'s Caſe, *February* 24, 1709, where the firſt Duke of *Beaufort* gave the Uſe of his Plate to his Ducheſs for Life, whom he made Executrix, and afterwards gave the Plate to his Grandſon the late Duke, without Diſpoſing of the Surplus;

---

* Mr. *Vernon* died the *February* before this Decree was pronounced.

and decreed by Lord *Cowper* that the Ducheſs was but a Truſtee as to the Surplus, for the next of Kin; but reverſed by the Houſe of Lords; the Reaſon of which might be, becauſe this was not properly a Deviſe to the Ducheſs of the Uſe of the Plate, but rather an Exception or Reſervation to the Ducheſs, a Deviſe of the Plate to the Grandſon, reſerving the Uſe thereof to the Ducheſs the Executrix for her Life.

(*a*) *Mich.* 1711.

Secondly, (*a*) *Weſtcomb* verſus *Jones*, *Mich.* 10 *Anna*, by Lord Keeper *Harcourt*, where a Leaſe for Years was bequeathed to the Executrix for Life, with Remainder over to *J. S.* and decreed that the Executrix was not barred of the undiſpoſed Surplus; and this his Lordſhip held might be ſo, within the Reaſon of the Ducheſs of *Beaufort*'s Caſe; for it being an Exception or Reſervation of the Term to the Executrix for her Life, it was not properly a Deviſe to the Executrix, and conſequently no Bar.

(*b*) 2 Vern. 678.

Thirdly, (*b*) *Ball* verſus *Smith*, *Hill.* 10 *Anna*, by Lord Keeper *Harcourt*, One deviſed ſome Plate to his Wife which ſhe had as Executrix to her former Huſband, and two other Pieces of Plate, in Lieu of, and Recompence for ſome other Plate which likewiſe had belonged to his ſaid Wife as Executrix to her former Huſband, but which the Teſtator had himſelf diſpoſed of; and made no Deviſe of the Surplus: Decreed, this ſhould not bar the Wife of the Surplus of the Teſtator's Perſonal Eſtate, for this Reaſon, the Deviſe to her of the Plate which ſhe before was intitled to as Executrix of her former Huſband was void, the ſecond Huſband having no Power to diſpoſe of that by his Will, * though he might do it by Act executed in his Life-Time; alſo as to the Deviſe to her of the other Plate, in Lieu of, and Recompence for what he had diſpoſed of in his Life-Time, out

---

* But by the Report of this Caſe, 2 *Vern.* Lord *Harcourt* ſaid he was content to have it conſidered as a Legacy given by her Huſband.

out of that which belonged to her as Executrix, it muſt be reaſonable to conſtrue this as a Reſtitution rather than a Gift.

His Lordſhip ſaid there were ſeveral other Precedents on each Side, but theſe he thought to be the moſt material.

That as to the Reaſon of the Caſe it was moſt plain, the making a Perſon Executor ought not to amount to a Gift of the Teſtator's Perſonal Eſtate; it was no more than making him a Truſtee, the very Word *Executor* importing *ex vi Termini* that he was only appointed to execute the Will, and to have nothing but the Management of the Perſonal Eſtate.

That this was demonſtrable by a very common Caſe: As if I make *A.* my Executor, and ſay no more, and *A.* dies Inteſtate, without diſpoſing in his Life-Time of this Perſonal Eſtate, (*a*) *my* next of Kin, and *not* the next of Kin of *my Executor*, ſhall have Adminiſtration *de Bonis non*, together with all my Perſonal Eſtate.

(*a*) Vide *Duke of Rutland* verſus *Ducheſs of Rutland*, 2 Vol. 97.

Whereas were I to make *A.* my Executor, and alſo *give him my Perſonal Eſtate*, and die, and afterwards my Executor ſhould die Inteſtate, without diſpoſing of my Perſonal Eſtate, the next of Kin and Adminiſtrator of my Executor ſhould have this Perſonal Eſtate, *and not my next of Kin*, which is a Demonſtration, that the making a Man Executor is not giving him the Perſonal Eſtate; for in the one Caſe only, where the Perſonal Eſtate is given to the Executor, on the Death of ſuch Executor, ſhall his next of Kin have the Perſonal Eſtate, but not in the other.

That the Executor is but a Truſtee, and ſuch, as well with Regard to the Legacies given by the Will to (*a*) Poſt in *Wind* verſus *Albone*, 575.

a (*a*) third Perſon, as to the reſt of the Perſonal Eſtate, is plain, in that if the Teſtator by Will gives a Legacy (ſuppoſe the Legacy of a Horſe) to *J. S.* and dies, ſtill the legal Property of this Horſe is in the Executor, as much as the legal Title to the reſt of the Teſtator's Perſonal Eſtate, and ſuch legal Property of the Horſe continues in the Executor until he aſſents to the Legacy.

By the Statute of Diſtribution the Succeſſion to the Perſonal Eſtate is as much ſettled and fixed in the next of Kin (where it is not diſpoſed of by the Will) as by the Common Law the Title to the Real Eſtate is fixed in the Heir at Law, if not given away by the Will; and therefore it might in Reaſon be a Queſtion, even if there were no expreſs Legacy given to the Executors, nor any Diſpoſition of the Surplus by the Will; for it ſeems within the Reaſon of the Caſe, where a Man by his Will deviſes his Real Eſtate to *J. S.* for the Payment of his Debts, after Payment thereof the Deviſee is clearly but a Truſtee for the Heir.

Even ſo by making an Executor, I make him a Truſtee of my Perſonal Eſtate for the Payment of my Debts; and if I do not give him the Surplus, why ſhould not ſuch an Executor *pari ratione* be a Truſtee for my next of Kin? But this may be carrying it too far.

However, where the Teſtator by expreſs Words has ſaid that his Executors ſhould have 50 *l.* a-piece out of his Perſonal Eſtate, it were offering Violence to the Will, for a Court of Equity to ſay ſuch Executors ſhould not only have 50 *l.* a-piece, but all the Reſt of the Perſonal Eſtate; this would be indeed ſaying, that ſuch Executors ſhould have all and ſome.

2 An

An Executor has nothing in his own Right, but what is expreſly given him by the Will, and ſo differs from an Heir who is ſeiſed in his own Right; and it is moſt reaſonable, that where a Teſtator gives his Perſonal Eſtate from his neareſt Relations, *he ſhould ſay ſo*, elſe why ſhould it be preſumed? Beſides this Caſe is the ſtronger, in regard the Will is plainly an imperfect and unfiniſhed Will; and it is not to be imagined but that if the Teſtator had compleated it, he would have given a Competency to his next of Kin, which he has here not done.

Upon the whole; here being an expreſs Legacy of 50 *l.* to each of the Executors, and no Diſpoſition of the Surplus of the Perſonal Eſtate, the Executors are but Truſtees with Reſpect to ſuch Surplus, which muſt go to the next of Kin, according to the Statute of Diſtribution.

Sir *Matthew Jeniſon* verſus *Lord Lexington.*

Caſe 160.

Maſter of the Rolls.

J. S. Leſſee of Land to him and his Heirs for three Lives, aſſigns the whole Eſtate, reſerving a Rent to him and his Executors, and dies, his Executors and not his Heir are entitled to the Rent.

A Tenant for three Lives to him and his Heirs, aſſigns over his whole Eſtate in the Premiſſes by Leaſe and Releaſe, to *J. S.* and his Heirs, reſerving a Rent of 10 *l.* a Year to the Aſſignor, *his Executors, Adminiſtrators and Aſſigns*, with Proviſo that upon Non-payment the Aſſignor and *his Heirs* might re-enter, and the Aſſignee covenants to pay the Rent to *A.* the Aſſignor, *his Executors and Adminiſtrators.*

Objected, This Rent reſerved comes in Lieu of Land, and as the Land would have gone to the Aſſignor and his Heirs, ſo ſhall the Rent, and this is further explained by the Proviſo, which ſays the Aſſignor and *his Heirs ſhall enter*.

On the other Side I inſiſted, that the Aſſignor having parted with his whole Eſtate for all the three Lives, he had no Reverſion left in him to which the Rent could be incident; and therefore it being by expreſs Words reſerved to the Executors, it ſhould go to them for the three Lives. That in Caſe one ſeiſed in Fee ſhould leaſe the Premiſſes for Years, reſerving a Rent to the Leſſor and his Executors, this would prevent the Rent from going to the Heir, though he had the Reverſion, and the Rent in ſuch Caſe would (*a*) ſink after the Death of the Leſſor, and would not go to the Executors, becauſe they would not be intitled to the Reverſion to which the Rent was incident: So if Tenant for three Lives were to make a Leaſe for Years, reſerving a Rent to him and his Executors, it would not go to his Heir, neither to his Executors; but in the Principal Caſe, there being no Reverſion to which the Rent was incident, it might be reſerved to the Executors. For

(*a*) 1 Inſt. 47. a.

That when the whole Eſtate was granted away, reſerving a Rent, the Reſervation of the Rent was like a new Grant from the Aſſignee, and there was no Doubt but a Rent might be granted or aſſigned to one and his Executors for three Lives. That in *Sacheverel* (*b*) and *Frogate*'s Caſe, where a Man ſeiſed in Fee leaſed the Premiſſes, reſerving a Rent to himſelf, his Executors and Adminiſtrators during the Term, it was the Words [during the Term] which made it a good Reſervation to the Heir.

(*b*) 2 Saund. 361, 367.

Cur': It is a plain Caſe and no need of mooting it; here is no Reverſion to the Aſſignor, and the Rent is by expreſs Words reſerved to the Executor, the Proviſo for the Heir to enter is not material, as long as the Reſervation of the Rent is to the Executor, for in ſuch Caſe the Heir is a Truſtee for the Executor; ſo diſmiſs the Bill with Coſts.

Afterwards (*a*) this Matter came on again by a Bill of Interpleader of the Duke and Ducheſs of *Rutland's* Daughter, Heir and Executrix of Lord *Lexington*; at the Hearing of which, Sir *Matthew Jenniſon* made Default; and Lord Chancellor *King* ſaid, that if the Reſervation were void, yet the Covenant muſt be plainly good, which was to pay the Rent to the Executors and Adminiſtrators of *A.* the Aſſignor; but the Court inclined that here being no Reverſion, the Rent during the three Lives might be well reſerved to the Executors; and at Length decreed it to the Executors.

(*a*) Trin. Term 1727.

Baugh verſus *Holloway*.

Caſe 161.
Lord Chancellor Parker.
One of the three Witneſſes to the Will is a Deviſee of Part of the Land; Whether not a good Witneſs, if he aliens the Land without Covenant or Warranty?

ONE makes his Will and (*int' al*) deviſes Lands to *A.* and his Heirs, in Truſt to pay the Teſtator's Heir at Law 200 *l.* and there are three Witneſſes to the Will, one of which is *A.* himſelf the Deviſee of theſe Lands.

The Heir brings his Bill to impeach the Will for Want of three credible Witneſſes, in Regard *A.* the Deviſee of the Land is not a credible Witneſs, but a Party intereſted.

Whereupon Sir *Robert Raymond* obſerved, that it had been determined in the Caſe of (*b*) *Hildyard* verſus *Jennings* by Lord Chief Juſtice *Holt*, that the Will as

(*b*) Carth. 514.

to this Deviſe only, was void, and then *A.* would be a good Witneſs as to the Reſt (*a*) of the Will.

(*a*) Vide Swinb. 296.

Nay, that even with Reſpect to the Lands deviſed to *A.* if *A.* had aliened ſuch Lands without any Covenant or Warranty, or had not by taking the Rents and Profits been liable to Account, he would, according to the above mentioned Reſolution, have been a good Witneſs to the whole Will; juſt as if *A.* had been a Legatee of Money, and (*b*) had releaſed the Legacy, there could in ſuch Caſe (as every Day's Experience ſhews) have been no Objection to his Evidence.

(*b*) Swinb. ubi ſupra.

The Court ſaid nothing as to this Point, but that the Heir ought to have conteſted the Will at Law; and if it had been adjudged againſt him there, (*viz.*) that the Will was good, then he might have come here for the 200 *l.* wherefore retain the Bill for a Year from *Michaelmas* Term next, that the Plaintiff may have two Aſſiſes to try this Will, but let the Plaintiff pay the Defendant his Coſts.

Caſe 162.

Marlow verſus *Pitfield*.

One borrows Money during his Infancy, and applies it to the buying of Neceſſaries, and afterwards coming to Age deviſes his Lands for Payment of his Debts; this Debt contracted during Infancy is within the Truſt.

ONE *Pitfield* an Infant, whoſe Eſtate was conſiderable, but conſiſted chiefly of a Reverſion after his Father's Death, having married without his Father's Conſent, was thereupon diſcarded by him, and forced to take a Houſe for himſelf and his Wife. Not long after this he attained his full Age, and having during his Infancy borrowed Money (which Money ſo borrowed amounted to 130 *l.*) and therewith bought ſome Neceſſaries, made his Will, deviſing his Real Eſtate to Truſtees for the Payment of his Debts with Intereſt.

The Queſtion was, whether the Monies actually advanced to the Teſtator *Pitfield* during his Infancy were to be paid within this Truſt?

His Honour the Maſter of the Rolls took Time to conſider of it, and now gave his Opinion that this Money actually lent to the Teſtator, though during his Infancy, was within the Truſt and ought to be paid.

Firſt, The Court admitted that if an Infant be ſued in an *Aſſumpſit* for Money lent him during his Infancy, the Defendant may plead *Non aſſumpſit*, and give the Infancy in Evidence, which demonſtrates that the Promiſe or Contract is void, and therefore to be given in Evidence on *Non aſſumpſit*, as was reſolved by *Treby* Chief Juſtice. (*a*) And the Diverſity is betwixt the Deed or Bond, and the bare Promiſe of an Infant; for though the latter be merely void, ſo as to enable the Defendant to plead *Non aſſumpſit*, yet in Caſe of the former, the Infant cannot avail himſelf of the Plea of *Non eſt Factum*, but muſt plead his Infancy.

(*a*) Salk. 279, 386, 387.

Infant borrows Money and applies it towards Payment of his Debts for Neceſſaries; Infant liable to pay this in Equity, tho' not at Law.

Secondly, Though the Law be, that if one actually lend Money to an Infant, even to pay for Neceſſaries, yet as the Infant in ſuch Caſe may waſte and miſapply it, he is therefore not liable, according to the Reſolution in *Salk.* 279. it is however otherwiſe in Equity; for if one lends Money to an Infant to pay a Debt *for Neceſſaries*, and in Conſequence thereof the Infant does pay the Debt, here although he may not be liable at Law, he muſt nevertheleſs be ſo in Equity; becauſe in this Caſe the Lender of the Money ſtands in the (*b*) Place of the Perſon paid, *viz.* the Creditor for Neceſſaries, and ſhall recover in Equity, as the other ſhould have done at Law.

(*b*) Vide ante *Harris* verſus *Lee*, 483.

Thirdly, His Honour thought that as Equity ſhould take Care of Creditors, ſo it ought to ſhew it's Concern for Infants, and not give any Encouragement whereby theſe might be drawn in during their Infancy to take up ſuch Sums as might ruin them; and therefore had there been in the Principal Caſe the leaſt Circumſtance of Fraud, or had the Money been advanced to ſupply the Infant's Extravagancies, he ſhould have been of a different Opinion; but here the principal Sum being but 130*l.* and the Infant's Eſtate conſiderable, and he being on his Father's Diſpleaſure left deſtitute and obliged to borrow Money for his neceſſary Support, it could not be imagined but had the Teſtator been now living, and been aſked the Queſtion, whether the Debts which he had actually and without Fraud contracted, ſhould be paid within the Truſt? He would have ſaid that they ought to be paid.

Wherefore conſidering all Circumſtances, and particularly ſince he did not barely deſire that his Debts ſhould be paid, but with Intereſt alſo (which is unuſual); it was decreed, that this Money actually lent as aforeſaid, though during the Teſtator's Infancy, was within the Truſt.

Caſe 163. *Lord Chancellor* Parker. Though a Creditor comes into a Commiſſion of Bankruptcy, and proves his Debt, and is prevailed on to be an Aſſignee, (being informed that otherwiſe he ſhould loſe his Debt) yet if the Bankrupt has no Eſtate, the Creditor may take the Bankrupt in Execution, if he will wave any Benefit of the Statute.

Ex parte *Salkeld.*

Salkeld was a Clothier in Town, and *Hale* made Cloth in *Wiltſhire*; *Salkeld* was indebted to *Hale* in 180*l.* for Cloths, and afterwards by Bill of Sale aſſigned over theſe Cloths *int' al'* to his Father-in-Law *Jackſon* towards Satisfaction of a Debt pretended to be due from him to *Jackſon.*

Hale brought an Action at Law againſt *Salkeld*, and having obtained Judgment took him in Execution on a *Ca. Sa.* and this was about two Years ſince; an Act was made the (*a*) laſt Seſſions, whereby a Bankrupt, in Caſe he ſurrenders himſelf, be examined, and four Fifths in Value and Number of his Creditors ſign his Certificate, and teſtify their Conſent, *&c.* is to be diſcharged.

(*a*) Vide 5 Geo. cap. 24.

After this, the Bankrupt's Father-in-Law takes out a Commiſſion of Bankruptcy againſt *Salkeld*, under which *Hale* is prevailed on to come and be Aſſignee, being told that otherwiſe the Bankrupt's Father-in-Law would ſink the Eſtate and get him diſcharged.

It proved that the Bankrupt's remaining Eſtate was but ſome few Shillings, and ſome deſperate Debts.

Salkeld the Bankrupt petitions that he might be diſcharged out of Execution, ſince *Hale*, at whoſe Suit he was taken in Execution, had come into the Commiſſion, and proved his Debt, nay was the Aſſignee under the Commiſſion, and that this had been often ſettled; nor could it make any Diverſity, whether the Bankrupt's Eſtate was great or ſmall, for the Creditors could have but all: That though *Hale* had propoſed waiving all Benefit and Advantage accruing from the Commiſſion, yet this was now too late, he having come in under it, proved his Debt, and conſented to be Aſſignee, which was a plain Election to proceed this Way, and being once made could not be waived afterwards.

On the other Side it was inſiſted, that if Fraud appeared on the Bankrupt's Side, and an honeſt Debt on the Creditor's, Equity ought not to interfere in Prejudice of the honeſt Creditor, and in Favour of the fraudulent Bankrupt; which *Lord Chancellor* admitted.

That here was Fraud apparent, when the Bankrupt's Father-in-Law took out the Commiſſion, which muſt be intended in Favour of the Bankrupt, and not of his Creditors; whereas the Creditors Good is the proper End of ſuing out Commiſſions.

The Reaſon of a Creditor's coming in under the Commiſſion, and proving his Debt, may be to oppoſe the Bankrupt's being diſcharged.

That it might be thought neceſſary *Hale* ſhould prove his Debt before the Commiſſioners in order to oppoſe the Bankrupt's Diſcharge; and this was held to be reaſonable by *Lord Chancellor*.

That the Reaſon of it's having been frequently ruled that a Creditor could not come in before Commiſſioners, and then detain the Body of the Bankrupt in Priſon, was, becauſe it would be unconſcionable the Creditor ſhould detain the Bankrupt's Body in Cuſtody for Non-payment of his Debts, and yet ſeiſe all his Eſtate wherewith he was to pay them; but this Caſe differed, the Bankrupt having no Eſtate left to ſeiſe, in Regard all had been before made away by the Bill of Sale to his Father-in-Law.

No Election in Caſe of a Creditor's coming in under the Commiſſion to be paid out of the Bankrupt's Effects, if no Effects.

That another Reaſon why the Creditor ſhould not detain the Bankrupt's Body in Priſon for a Debt, was becauſe by coming into the Commiſſion the Creditor *elected* to have the Benefit of the Bankrupt's Eſtate towards ſatisfying his Debt, and therefore ought to waive his former Execution of the Body; but here could be no Election of an Eſtate where there was none; and this was like the Caſe of an *Elegit* to extend the Moiety of the Land, where after ſuch an Execution, the Plaintiff, it was true, could not take the Perſon of the Defendant, but if the Sheriff ſhould return that there was no Land, this would be no Election, and the Plaintiff might afterwards take the Body of the Defendant. Notwithſtanding, that in this Caſe the Creditor, to ſhew he was ſatisfied there was no Eſtate of the Bankrupt left to be diſtributed, was willing to waive all Benefit and Advantage under the Commiſſion.

Cur': This Commiſſion is plainly ſued out fraudulently by the Bankrupt's Father-in-Law to diſcharge the Bankrupt out of Cuſtody; the Propoſal is fair on the Creditor's Side, to waive any Benefit under the Commiſſion, and therefore ought to be accepted; the Creditor cannot be ſaid to elect to be ſatisfied out of the Eſtate, where there is none, which more particularly diſtinguiſhes this Caſe.

Argument of Fraud, if the Commiſſion be ſued out by the Bankrupt's Father, in order to diſcharge the Bankrupt.

I will not diſcharge this Bankrupt to the Prejudice of a Creditor, where it appears on the Face of the Thing, that the Commiſſion was ſued out in Favour of the Bankrupt himſelf by his Father-in-Law, and not for the Service and Advantage of Creditors.

Pinbury verſus *Elkin*.

Caſe 164. *Lord Chancellor* Parker. 2 Vern. 758, 766.

One poſſeſſed of a Perſonal Eſtate, deviſes if his Wife dies *ſans* Iſſue by him, that then 80 *l.* ſhall be paid to his Brother, good. Alſo good, though the Brother dies in the Life of the Wife.

ONE makes his Wife Executrix, and gives her all his Goods and Chattels; provided that if *ſhe ſhall die without Iſſue by the ſaid Teſtator, then after her Deceaſe* 80 *l.* ſhall remain to the Teſtator's Brother *J. S.* afterwards the Teſtator dies.

J. S. the Teſtator's Brother dies in the Life-Time of the Teſtator's Wife, and then the Wife dies without Iſſue, upon which the Queſtions were, *Firſt*, Whether this Legacy of 80*l.* was originally good, it being to take Effect in Caſe the Teſtator's Wife ſhould die without Iſſue by the Teſtator?

Secondly, Whether if originally good, it was not ſince become void by the Death of *J. S.* the Legatee in the Life-time of the Teſtator's Wife, and before the Contingency happened?

This Caſe being argued before *Lord Chancellor*, his Lordſhip took Time to conſider of it, and now gave Judgment.

The ſeveral Senſes of the Words *dying without Iſſue.* (a) Ante *Nichols* verſus *Hooper*, 198.

He ſaid, that the Words [dying without Iſſue] had ſeveral Senſes (*a*); as *Firſt*, a legal Senſe, when there was a Failure of Iſſue of Tenant in Tail, ſo as to intitle the Remainder-man, or Reverſioner to a *Formedon* in Remainder or Reverter, which is, whenever there is a Failure of Iſſue of the Body of Tenant in Tail.

Secondly, Another Senſe of dying without Iſſue was, if the Party died *without ever having had Iſſue*, and that was the Senſe put upon theſe Words in the Caſe of *Brett* verſus *Pildridge*, cited in 1 *Sid.* 102. and in 1 *Keb.* 248, 462. where a Man gave a Portion with his Daughter in Marriage, and the Husband Covenanted with his Father-in-Law to repay him 500*l.* Part of the Portion, if the Daughter ſhould dye without Iſſue within two Years after the Marriage; the Daughter had Iſſue within two Years, but ſhe and afterwards her Iſſue died without Iſſue within the two Years; and the Caſe coming on in Chancery was referred to the Opinion of four Judges, who all held, that the Father ſhould not have any of the Portion back again, in Regard there *once* had been Iſſue of the Marriage.

Thirdly, But by the third Senſe of a Perſon's dying without Iſſue, is intended, *without leaving Iſſue at the Time of his* (*a*) *Death*, and in this Senſe the Words [dying without Iſſue] ſhall be taken in the principal Caſe; which indeed ſeems to be the natural Meaning of theſe Words: For taking the Caſe to be that *J. S.* dies leaving a Son, and afterwards that Son dies without Iſſue, and one ſhould aſk any Gentleman (not of the Bar) whether *J. S.* died without Iſſue? It would be naturally, truly and properly anſwered No: *J. S.* did not die without Iſſue, but left Iſſue a Son; but that Son is ſince dead without Iſſue, ſo that *now J. S.* is dead without Iſſue; for the Words [die without Iſſue] are relative to the Death of the Party, and it is plain, that at *J. S.*'s Death, when he left a Son, he did not die without Iſſue.

(*a*) Ante ubi ſupra, & poſt in *Forth* verſus *Chapman*, 666.

Moreover, in the Principal Caſe, the Words import ſtrongly that they are to be intended in this Senſe (to wit) dying without Iſſue *living at the Party's Death*, becauſe the Leagacy of 80 *l.* (being the Legacy in Queſtion) if the Wife ſhould die without Iſſue by the Teſtator, then after her Deceaſe is to remain to the Teſtator's Brother (*b*), which Words *then after*, i. e. *immediately after*, would be inconſiſtent and repugnant, if the dying without Iſſue ſhould be taken in the other Senſe whenever there ſhall be a Failure of Iſſue; for this would be carrying the Payment beyond the Day; it would be as abſurd as to appoint the Day of Payment to be to Morrow, if it ſhall rain this Day Twelvemonth, which is to make the Condition over-reach the Day of Payment.

(*b*) See the Caſe of *Hughes* verſus *Sayer*, 534.

Alſo his Lordſhip ſaid, that taking the 80 *l.* as intended to be given whenever there ſhould be a Failure of Iſſue of the Body of the Teſtator's Wife by him; this would be a ſtrange Clog upon a Perſonal Eſtate, and ſubjecting it to the Payment of a Sum of Money (as it might happen) one Hundred Years hence, when it would be no Kindneſs to the Legatee, in whoſe Favour it was (a) *Perſonally* intended; but by that Time he muſt be ſuppoſed to be dead, and it might be difficult at ſuch a Diſtance of Time to find out his Repreſentatives. Not but that a Covenant to pay a Sum of Money when there ſhould be a Failure of Iſſue of the Body of *B.* would ſurely be (b) good.

(a) Vide ante *Nichols* verſus *Hooper*, 198.

(b) Vide poſt in *Pleydel* verſus *Pleydel*, 750.

As to the other Point in the principal Caſe, that the Teſtator's Brother who was the Legatee of the 80*l.* in Queſtion, was dead before the happening of the Contingency, that is, before the Teſtator's Wife died without Iſſue, the Court ſaid, they were of Opinion, this Poſſibility would go to the Executors of the Legatee. That it was true in *Swinburne* 461, 462, *&c.* ſome Caſes were put which ſeemed to import the Contrary; but thoſe Caſes were ſo darkly put, and with ſo many Inconſiſtencies, as to be all over-ballanced by the Opinion of Lord *Nottingham* in 2 *Vern.* 347. (*Anonymus* Caſe) where a Man deviſed 100*l.* to *A.* at the Age of twenty-one Years, and if *A.* died under Age, then to *B.* *B.* died in the Life-Time of *A.* and afterwards *A.* died under Age, yet decreed that the Executors of *B.* ſhould have this 100*l.*

Therefore decree that the Plaintiff ſhall have his Legacy of 80*l.* with Intereſt from the Death of the Teſtator's Wife, and alſo his Coſts.

Cann verſus *Cann*.

Caſe 165. *Lord Chancellor* Parker. See more relating to this Caſe, *poſt* 723. Court refuſed to publiſh Depoſitions *de bene eſſe*, in order to compare them with the Depoſitions in the ſame Cauſe, taken on an Examination in Chief.

THE Plaintiff examined Witneſſes *de bene eſſe*, and afterwards examined them in Chief, and the Cauſe was heard; but the Court taking Time to conſider of it, and the Defendant obſerving that ſome of the Witneſſes examined by the Plaintiff to prove the Will in Queſtion (which was by the Plaintiff alledged to be made by Sir *Robert Cann* the Defendant's Father ſubſequent to that Will under which the Defendant claimed, who was the younger Son of the ſaid Sir *Robert Cann*) had confeſſed, that they would not ſwear the Defendant's Father did ever ſign the ſaid Will, and that yet the ſame Witneſſes, when examined in Chief, had ſworn poſitively the ſaid Defendant's Father Sir *Robert Cann* did ſign the Will, which pretended Will was alledged by the Plaintiff to have been ſuppreſſed by the Defendant's Mother-in-Law, and by the Defendant himſelf.

The Defendant having Reaſon to believe, that the Witneſſes when examined *de bene eſſe*, did not ſwear ſo fully, as they had been prevailed upon to do when examined in Chief, petitioned the Lord Chancellor, that theſe Depoſitions *de bene eſſe* might be publiſhed, or at leaſt that his Lordſhip would be pleaſed to order them to be brought before *him* for his Inſpection, which in this Caſe his Predeceſſors Lord *Sommers* and Lord *Cowper* had done, in order to ſatisfy themſelves whether the Cauſe which had ſlept ſo long as —— Years, ſhould proceed or no.

And for the Petition it was urged, that it could not be thought that the Plaintiff himſelf ſhould oppoſe this Prayer, it being only to diſcover Truth, which the Plaintiff would hardly own he was afraid ſhould be diſcovered.

covered. That though this was not known to have been done before, yet the Reaſon was, becauſe it might be a Wrong to *the Defendant* to have theſe Depoſitions publiſhed; for that the Defendant would have no Opportunity of croſs-examining the Witneſſes which the Plaintiff had examined *de bene eſſe*; but when the Defendant himſelf deſired to have theſe Depoſitions publiſhed, *Volenti non fit Injuria*.

The Reaſon of examining a Witneſs *de bene eſſe*.

Lord Chancellor: It is admitted on both Sides, that what is now aſked, (*viz.* the Publication of the Depoſitions taken *de bene eſſe*) was never yet done; and it being without any Precedent, there ought to be very ſtrong Reaſons to prevail with the Court to do it. The Reaſon why the Court allows the taking of Depoſitions *de bene eſſe* is, either from a Contempt of the Party in not anſwering, and thereby preventing the Joining of Iſſue, or elſe where the Party is in Danger of loſing his Witneſſes in Caſe of Death, by Reaſon of Sickneſs or Age, ſo that there may be Ground to apprehend their not living to be examined in Chief; but if theſe Witneſſes do live and are examined in Chief, their Depoſitions *de bene eſſe* ſhall fall to the Ground, and are as it were buried, having anſwered the whole Purpoſe for which they were taken.

Whether a Proſecution for Perjury will lie on a Depoſition taken *de bene eſſe*.

If the Depoſitions *de bene eſſe* in the preſent Caſe were to be publiſhed, or any ways made Uſe of againſt the Witneſs ſo examined *de bene eſſe*, ſuch Witneſs ought to have a Copy of the Depoſitions before he is examined in Chief; to the Intent that he may have due cautionary Means allowed him, to prevent his contradicting himſelf, which is always done in the like Caſes; alſo many Queſtions might ariſe, if it ſhould happen that the Depoſitions *de bene eſſe* were quite contradictory to the Depoſitions in Chief; for I do not think it can be Perjury at * Law, there being no Iſſue joined, as there muſt be before the Depoſitions are taken in Chief.

And as to ſeeing theſe Depoſitions *myſelf*, it is true, Lord *Sommers* and Lord *Cowper* did order Copies to be brought to them to inſpect; but that was for enabling them the better to judge whether the Plaintiff in thoſe Cauſes, after ſo long Time elapſed ſince the Commencement of them, and ſo many Tranſactions in them, ſhould be allowed after the Plea to proceed to a Hearing; but as this Cauſe has ſince proceeded to a Hearing, for me to read theſe Depoſitions *de bene eſſe* in my Study, if I ſhould there form any Judgment upon them, it would be ſtrange that *That* ſhould guide me, which no other Perſon is to know any Thing of.

No, let all People be at Liberty to know what I found my Judgment upon; that ſo when I have given it in any Cauſe, others may be at Liberty to judge of *me*.

Whereupon the Petition was diſmiſſed, the Court refuſing to publiſh the Depoſitions taken *de bene eſſe*.

Note; Mr. *Vernon* who was againſt publiſhing theſe Depoſitions inſiſted very much, that what was aſked was without Precedent; tho' what was now ſurmiſed muſt have often before happened, and nothing was ſworn in the Depoſitions after Iſſue joined, but what was very probable, namely, That a Father who had made his Will in Favour of his younger Son, on that younger Son's drawing his Sword againſt his Father, and attempting to take away his Life, ſhould afterwards revoke this Will which he had before made in Favour of ſuch younger Son.

---

* Cro. Car. 352. 3 Inſt. 167. And yet it ſeems as if ſuch Depoſitions taken *de bene eſſe*, upon a Bill to perpetuate the Teſtimony of Witneſſes, where there is no Iſſue joined, on the Death of the Witneſs may be read in Evidence. Carth. 265.

DE

Term. S. Michaelis,

1719.

Caſe 166.

At the Rolls.

See this Caſe cited in Precedents in Chancery 534 by the Name of *Scould* verſus *Butter*.

Bill in Equity will not lie for a ſpecific Performance of an Agreement to transfer *South-Sea* Stock.

Cud verſus *Rutter*.

THE Defendant, in Conſideration of two Guineas paid down, did by Note under Hand agree to transfer 1000 *l.* *South-Sea* Stock at a fixt Price at the End of three Weeks; the Plaintiff on the Day demanded the Stock, and offered to pay the Price; but on the Defendant's inſiſting that he would only pay the Difference, and not transfer the Stock, the Plaintiff brings this Bill for a ſpecific Performance, and to have the Stock aſſigned.

Objected, That the compelling a ſpecific Execution of Contracts muſt be allowed to be diſcretionary in this Court, and there was not a Single Inſtance or Precedent, where it had been done in ſuch a Caſe as this; that the Plaintiff was put to no Inconvenience, ſince the Defendant had offered, and by his Anſwer continued to offer, to pay the Difference; that the Plaintiff might for aſking have the ſame Quantity of Stock any where upon the Exchange. Indeed, had the Agreement been for a Houſe or Land, which might be a Matter of Moment and Uſe, in that Caſe (ſuppoſing all Things to have been fairly tranſacted) there might be ſome Reaſon why Equity ſhould execute ſuch Agreement; but in a Matter of ſo little Conſequence as the preſent Caſe, there could be no Neceſſity for this Court to interpoſe.

Cur': The Plaintiff ought to have an Execution of the Contract; for the Agreement is a fair one, and in Writing, and Part of the Money paid. Suppoſe the whole Money had been paid, ſhould not Equity have executed it? If ſo, where is the Difference betwixt a great Sum and a ſmall one? If the Agreement had been to transfer Stock or pay the Difference, this might have looked like Stock-jobbing; but the Plaintiff, as is proved in the Cauſe, refuſed to let the Note be ſo penned, notwithſtanding that the Defendant had deſired it. Decreeing an Execution of ſuch an Agreement, is beating down and preventing Stock-jobbing. Wherefore let the Defendant transfer 1000 *l. South-Sea* Stock accounting for the Dividends, and paying the Coſts; and let the Plaintiff pay the Defendant Intereſt for the Money from the Time that it ought to have been paid, according to the Contract.

But afterwards on an Appeal, the Lord Chancellor *Parker* reverſed this Decree, delivering his Opinion with great Clearneſs, that a Court of Equity ought not to execute any of theſe Contracts, but to leave them to Law, where the Party is to recover Damages, and with the Money may if he pleaſes buy the Quantity of Stock agreed to be transferred to him; for there can be no Difference between one Man's Stock and another's. It is true, one Parcel of Land may vary from, and be more commodious, pleaſant, or convenient than another Parcel of Land, but 1000 *l. South-Sea* Stock, whether it be *A. B. C.* or *D.*'s is the ſame Thing, and in no Sort variant; and therefore let the Plaintiff, if he has a Right, recover in Damages, with which, when received, he may buy the Stock himſelf.

Caſe 167.
Lord Chancellor Parker.

Wind verſus *Jekyl* & *Albone.*

ONE poſſeſſed of a Term for Years deviſed it to *A.* for Life, Remainder to *B. B.* in the Life-Time of *A.* deviſed his Remainder to *J. S.* who deviſed it over; upon which the Queſtion now was, whether *A.* (the Deviſee for Life) being dead, the Deviſee of *J. S.* ſhould have the Term, or whether it ſhould go to the Adminiſtratrix *de bonis non*, with the Will annexed of *B.*?

A. deviſes a Term for Years to *B.* for Life, Remainder to *C. C.* in the Life of *B.* deviſes his Remainder. This is good, and amounts to *C.*'s declaring by his Will, that his Executor ſhall ſtand poſſeſſed of the Term, in Truſt for the Deviſee. *Vide* Pollexf. Rep. 44. *Veizy* verſus *Pinwell*, this very Point determined 16 Car. 1. by the then Lord Keeper.

For the latter it was objected, That here were no Creditors or Purchaſer for a valuable Conſideration concerned, ſo as to merit the Aſſiſtance of a Court of Equity; that in the Notion of Law, *A.*'s Life was of longer Continuance than any Term for Years, and the Law muſt be the ſame either in the Caſe of a long or ſhort Term; and ſince the firſt Deviſee for Life might poſſibly ſurvive the Term, and ſo the Deviſe over be good for nothing, for this Reaſon *B.* had originally but a Poſſibility. Then if nothing veſted in *B.* until the Death of *A.* who during his Life had the whole Term in him, (as the Law ſaid he had) it followed that *B.* having nothing in him till the Poſſibility fell, could transfer Nothing to another, *Nihil dat qui non habet*; and that *B.* the Deviſee in Remainder could not aſſign over this Term, was ſaid to appear from a Caſe cited in 4 *Co.* 66. *b. Fulwood*'s Caſe, as alſo from 10 *Co.* 47. *b. Lampett*'s Caſe, where it is obſerved to be the Wiſdom of the Law, that Poſſibilities and *Choſes en Action* are not grantable over, (ſo that Poſſibilities and *Choſes en Action* were put on the ſame Foot) and it was plain that a Bond or *Choſe en Action* was not aſſignable, but the Aſſignee muſt ſue in the Aſſignor's Name.

Againſt which I urged, That however the legal Title to the Remainder of this Term after the Death of *A.* might belong to the Adminiſtrator *de bonis non* with the Will annexed of *B.* yet this Court which conſidered the Intention of the Parties, and particularly in Wills, would look upon the Adminiſtrator in this Caſe but as a Truſtee for the Deviſee; juſt as if *B.* had by his Will given the Remainder of this Term to *J. S.* and made *J. N.* Executor *quoad* the Term, this had been plainly making the latter a Truſtee for the former; that agreeable to this were former Reſolutions, as in *Moor* 806. *Cole* verſus *More*, where one poſſeſſed of a Term deviſed it to *A.* for Life, Remainder to *B.* and made *A.* Executor, *B.* deviſed his Remainder to *C.* and died in the Life of *A.* and in order to defeat *C.* of his Intereſt, *A.* aſſigned his Term to a third Perſon. Decreed by Lord Chancellor *Elleſmere*, that *A.* the Executor and Deviſee for Life was a Truſtee for *B.* and ſhould not be at Liberty to deſtroy this Remainder, but that the Executor ſhould preſerve the Leaſe, ſo as it might go according to the Will with the Performance whereof the Executor was intruſted.

Nay, in 1 *Chanc. Caſes* 4. *Goring* verſus *Bickerſtaff*, when the Truſt of a Term was deviſed to *A.* for Life, Remainder to *B.* it was agreed by all *in one uniform Opinion*, (ſays the Book) that *B.* might aſſign over this Truſt, which goes further than the former Caſe, as it ſhews that a Truſt of a Term in Remainder may be transferred over by Deed.

And as to what was cited from *Lampet*'s Caſe, that Poſſibilities and *Choſes en Action* are put upon the ſame Foot, it being plain an Obligee in a Bond might deviſe away his Bond, there could be no Doubt but the Deviſee over in the preſent Caſe might deviſe his Remainder. So if *B.* the Remainder-man ſhould have aſſigned over his Intereſt for a valuable Conſideration paid by the Aſſignee, though this was void at Law, yet it had been * good in Equity, and whenever ſuch Remainder of the Term had come into Poſſeſſion, *B.* had, as Truſtee for his Aſſignee, been compellable in Equity to have conveyed the Term to him; and it would have been as ſtrong, as if *B.* for a valuable Conſideration had covenanted to aſſign over the Poſſibility to the Purchaſer, whenever it ſhould fall into Poſſeſſion, which ſurely had been good.

(*a*) 2 Vol. in *Gore* and *Gore*, 42.

Lord Chancellor: It has been reſolved, and the Law is ſo, That *B.* the Deviſee in Remainder cannot (*a*) by Deed aſſign over this Poſſibility; for in Law no Eſtate veſts in *B.* during the Life of *A.* and he having nothing can transfer nothing.

Anciently there were rarely any Leaſes for Years but what were for a ſhort Time; for which Reaſon they were eſteemed to be of leſs Continuance than an Eſtate for Life; and for the ſame Reaſon ſuch Leſſee could not at Common Law falſify a feigned Recovery.

But the Law is very different now, as to Terms for Years, from what it was formerly; in ancient Times there were no Leaſes for Years, but what were for ſhort Terms which were very little regarded; this was the Reaſon why, if a real Action were brought againſt the Perſon who had the Freehold, and a Recovery was thereupon had, though by Covin, yet the Leſſee for Years, whoſe Eſtate was precedent to the Freehold, was (*a*) bound by this Recovery, and could not falſify until the Statute

(*a*) 1 Inſt. 46.

---

* That a Poſſibility of a Term is aſſignable for a good Conſideration, was (*int' al'*) determined in the Caſe of *Theobald* verſus *Duffay*, in the Houſe of Lords, in *March* 1729-30.

Statute of 21 *H.* 8. *cap.* 15. and therefore the Leaſes for Years uſually made being but ſhort, a Life was preſumed to have a longer Continuance than any Term, and therefore the Deviſe of ſuch a Term after a Life was void.

Again, a Deviſe of a Leaſe for Years differs from a Deviſe of a Freehold or Fee-ſimple; for Inſtance, one cannot deviſe Fee-ſimple Land, which he has not at the Time of making the Will; but * Leaſes or perſonal Eſtate, though they were not the Teſtator's at the Time when he made his Will, yet if they be his at the Time of his Death, ſhall paſs by the Will. Therefore, if one deviſes all his Real and Perſonal Eſtate, and afterwards acquires more of each Kind, the Real Eſtate acquired afterwards, ſhall not paſs; *ſecus* as to the Perſonal Eſtate; and yet the Intention of the Party muſt have been the ſame as to both: But I take the Reaſon of this Difference to be, that with Regard to the Real Eſtate bought after the making the Will, ſuppoſing *that* not to paſs, ſtill there is one in Law capable of taking it, (*viz.*) the Heir; but as to the Perſonal Eſtate, if the Executor, though made before the acquiring thereof, does not take it, it is uncertain who ſhall.

Diverſity betwixt the Deviſe of a Real Eſtate and the Deviſe of a Perſonal Eſtate; as if I deviſe all my Real and Perſonal Eſtate, and afterwards purchaſe more of each Kind, only the Perſonal Eſtate that is purchaſed afterwards ſhall paſs, and why.

Thirdly, A *Deviſe* of a Chattel-Intereſt differs from a *Grant* thereof, ſuch Deviſe veſting nothing in the Deviſee until the Executor aſſents; from whence it follows, that the Executor (*a*) is a Truſtee for the Legatee, with Reſpect to his Legacy, and this is the only Reaſon why the Legatee may bring his † Bill in Equity againſt

A Deviſe of a Chattel-Intereſt differs from a Grant of a Chattel-Intereſt, in that the Grantee is in immediately by the Grant; but ſuch Deviſee is not until the Aſſent of the Executor.

(*a*) *Farrington* verſus *Knightly*, ante 544.

* *Maſters* verſus *Maſters* ante 424. ſed Vide *Salk.* 237. *Bunter* verſus *Cook*, where the Court was in Doubt, whether a Chattel Real which the Teſtator had not at the Time of making the Will, would paſs thereby.

† As alſo why the Spiritual Court cannot Decree a Diſtribution of the undiſpoſed Surplus. *Vide ibid.*

againſt the Executor for his Legacy, ſuppoſing it to be a Truſt.

Then if the Deviſe be good by way of Truſt, ſuppoſe the Teſtator who was Deviſee in Remainder of this Term in the preſent Caſe, had declared his Executor to be but a Truſtee *quoad* the Term for *J. S.* had not this been good? Doubtleſs it had, and it is as ſtrong when the Teſtator does (as here) deviſe this Remainder or Poſſibility to *J. S.* for the ſame amounts to a Direction made by the Teſtator, that when ſuch Remainder of the Term ſhall come *in eſſe* by the Death of *A.* then his Executor is to convey it to *J. S.* and as this would have been good, ſo the Bequeſt of the Remainder is tantamount, every Legacy being a Direction to the Executor to deliver it over. The Office of the Executor is to purſue and perform the Teſtator's Will and Direction; and this is his Direction.

Or ſuppoſe *B.* the Deviſee in Remainder of this Term, had covenanted that when the Remainder ſhould take Effect in Poſſeſſion, he, or his Executors, would convey, this had been good, and the Covenantor, after ſuch Covenant, had been but a Truſtee for the Covenantee. Now why cannot this Truſt be as well declared by a *Will* as by a *Deed*?

Or if the Remainder-man in the preſent Caſe had made *J. S.* his Reſiduary Legatee, and *J. M.* his Executor in Truſt, ſhould not the Reſiduary Legatee have had the Benefit of this Poſſibility of the Term? Surely he ſhould, and not the Executor, who would be but a bare Truſtee; and therefore, (as has been rightly put at the Bar) if the Caſe had been, that *B.* the Deviſee in Remainder, had by his Will given the Remainder of this Term to *J. S.* and made *J. M.* Executor *quoad* the

Term, this had been plainly good; for it is the Intent and not the Form of the Will which is to be regarded.

By the ſame Reaſon then that if the Teſtator had made *J. M.* his Executor, *quoad* the Term, in Truſt for *J. S.* it had been good, even ſo when the Adminiſtrator claims that this Legacy may be granted to him as Adminiſtrator *de bonis non*, with the Will annexed of *B.* he muſt be a Truſtee *quoad* this Remainder of the Term when it falls into Poſſeſſion, for the Deviſee; and as a Conſequence of it, I decree that the Adminiſtrator *de bonis non*, &c. of *B.* do aſſign over the Term to the Deviſee of *J. S.* to whom *B.* deviſed it.

Naldred verſus *Gilham*.

Caſe 168. *Lord Chancellor* Parker. Vide 2 Vern. 473. *Clavering* verſus *Clavering*. *A.* makes a voluntary Settlement on her Nephew, keeping the Deed in her Power, in which Settlement there is no Power of Revocation; afterwards one ſecretly and by Fraud, on Behalf of the Nephew, gets an atteſted Copy of this Settlement; and then the Party who made the Settlement burns it, and ſettles the Premiſſes on another Nephew. The firſt Nephew's Bill to eſtabliſh the Copy of the firſt Settlement is diſmiſt with Coſts. Upon which the ſecond Nephew claiming under his Settlement, brings a Bill to have the atteſted Copy delivered up, and has a Decree for it; becauſe ſuch Copy had been indirectly gained.

Katherine Naldred ſeiſed in Fee of Lands of about 60 *l. per Annum* had a Nephew named *George Naldred* (the Plaintiff) and another Nephew called *Richard Gilham* (the Defendant.) The Plaintiff *Naldred* was about three or four Years old, and *Katherine* the Aunt, by Indenture of Covenant to ſtand ſeiſed, dated the 26th of *February* 1707, ſettled the Premiſſes on herſelf for Life, Remainder to her Nephew *Naldred* in Fee, without any Power of Revocation; but though the Aunt beſpoke two Parts thereof, yet ſhe kept both in her own Poſſeſſion.

Afterwards Mrs. *Naldred* being minded to ſettle the Premiſſes on her Nephew the Defendant *Gilham*, inſtead of her Nephew the Plaintiff *Naldred*, and adviſing with ſome Lawyer about it, was told ſhe had put it out of her Power, by having ſettled the Premiſſes abſolutely on the Plaintiff; whereupon ſhe expreſſed great Concern, ſaying ſhe had been impoſed upon. She afterwards burnt both theſe Parts of the Settlement by which ſhe had ſettled the Premiſſes on the Plaintiff *Naldred*, and by Leaſe and Releaſe dated the 23d and 24th of *October* 1713, made a new Settlement of the Premiſſes to the Uſe of herſelf for Life, Remainder to the Uſe of her Nephew the Defendant *Gilham* and his Heirs, and having delivered this laſt Settlement into the Defendant *Gilham*'s Hands, ſhe ſoon afterwards died.

The Plaintiff's Father had, in the Life of *Katherine Naldred* the Aunt, (who for ſeveral Years lodged and boarded at his Houſe) when ſhe was about leaving him, and he under ſome Apprehenſions that ſhe would alter the Settlement, by Stealth and without the Privity of the Aunt, got at this firſt Settlement by which the Plaintiff claimed, and having procured an atteſted Copy of it put up the two Parts where they were before placed by the Aunt, which ſhe burnt as aforeſaid.

After the Aunt's Death, the Plaintiff *Naldred* the Infant by his Father his next Friend brought a Bill to eſtabliſh this atteſted Copy againſt the Defendant *Gilham*, inſiſting that both the Settlements were voluntary, and therefore according to the Rule in ſuch Caſes, the Plaintiff's being the firſt voluntary Settlement (*a*) ought to prevail; and coming on before the *Maſter of the Rolls*, his Honour with great Clearneſs determined for the Plaintiff, and granted a perpetual Injunction againſt the Defendant, decreeing the Deeds to be delivered up, and likewiſe condemning the Defendant in Coſts.

(*a*) Vide ante *Young* verſus *Cottle*, 102.

But upon an Appeal to Lord Chancellor *Parker*, his Lordſhip after Time taken to conſider it, and ſeveral

Adjournments of the Cauſe, reverſed the Decree at the Rolls, declaring that it was plain the Aunt intended to keep this Eſtate in her Power; that ſhe deſigned there ſhould be a Power of Revocation in the Settlement; and that ſhe thought whilſt ſhe had the Deed in her Cuſtody ſhe had alſo the Eſtate at her Command; all which in this Caſe appeared more evidently from the Settlement being made by her on ſo tender an Infant, whoſe future Conduct it was impoſſible for her to foreſee, and that when ſhe was told, that by having made the Settlement abſolute, ſhe had diſabled herſelf from ſettling the Eſtate a ſecond Time, ſhe immediately expreſſed great Surpriſe, and complained ſhe had been impoſed upon; that in Fact ſhe appeared to *have been* impoſed upon, by preparing and making the Conveyance abſolute; which it had been unreaſonable in any one to have aſked of her. That taking her to have been impoſed upon in the Making this Settlement an abſolute one, when it ought to have been with a Power of Revocation, he did not ſee ſhe did amiſs in burning or deſtroying it, as this was but doing herſelf Right, and if in her Life-time the now Plaintiff had brought a Bill againſt her, in order to have the firſt Settlement ſet up, there ought not to have been any Relief upon ſuch a Bill.

That it was manifeſt the Aunt did no way intend to be bound by this Settlement, becauſe though there were two Parts of it, yet ſhe would not deliver either of them to the Plaintiff or his Friends, whereas ſhe parted with the ſecond Settlement to her Nephew the Defendant *Gilham*, which ſhewed her Intention to be bound thereby, and that as nothing could be more evident than that this atteſted Copy was procured clandeſtinely, indirectly, and without her Privity or Conſent, no Advantage ought to be made of a Writing gained in ſuch a Manner. That this atteſted Copy, if any Evidence of the firſt Settlement (as it ſeemed to the Court to be, when the Perſon who made the original had burnt it, and ſtronger than the Caſe, where the Party had the Original and would not produce it) being intended to be made Uſe of at Law, the Plaintiff did Wrong in coming here with a Title which (if any) was a legal one, at leaſt a Copy ſo indirectly gained ought not to be aſſiſted or countenanced in Equity; and ſince the Defendant ſtood expoſed to be diſturbed at Law in the Title, had been to no Purpoſe put to great Charge in this Court, and ſince the Mother who was *Prochein Amy* in the Father's Room, though ſhe came late into the Cauſe, yet when once made *Prochein Amy*, ſtood in the Place of the Father who was firſt ſo, and liable to pay all the Coſts as he was before; and as it was ſaid (and not denied) that ſhe had great Aſſets from her Husband the Teſtator, therefore, in order to make the Defendant Reparation for the needleſs Trouble and Expence he had been put to here, his Lordſhip decreed the Bill to be diſmiſt with Coſts, unleſs the Plaintiff's Mother and *Prochien Amy* ſhould within three Weeks deliver up the atteſted Copy of the firſt Settlement, and alſo give to the Defendant the Poſſeſſion of the Eſtate within the ſame Time.

Afterwards the Defendant *Gilham* brought a Bill againſt *Naldred* the Mother and *Naldred* the Son, to have this atteſted Copy of the firſt Deed of Settlement delivered up; and coming on to be heard the 10th of *February* 1720, *Lord Chancellor* declared that the ſaid firſt Deed of Settlement of the 26th of *February* 1707, ought not to prevail againſt the latter of 1713, for that though the firſt Settlement was ſealed and delivered, yet it was not delivered out of her Power; but the ſaid *Katherine Naldred* kept both Parts thereof in her own Cuſtody, that ſhe might deſtroy them, if ſhe thought fit; and *George Naldred* the Father of the Infant getting a

Copy of ſuch Settlement fraudulently, and by a Trick, ought not thereby to eſtabliſh it againſt the latter Settlement; and though regularly the firſt voluntary Settlement ought to prevail againſt the latter, yet if the firſt be gained by Fraud (and the ſole Evidence of this Settlement was ſo) it ought not to prevail againſt a ſecond Settlement, though voluntary. And notwithſtanding it was evident *Katherine Naldred* the Aunt did once intend the Premiſſes ſhould go to her Nephew *Naldred* the Infant; yet it was never her Deſign to put it out of her Power to alter or vacate the Settlement ſhe had made.

Of two voluntary Settlements, if the firſt be made abſolute againſt the Intention of the Party, the ſecond ſhall prevail.

Wherefore it was decreed, that the Copy of the firſt Settlement which *Joan Naldred* the Mother confeſſed by her Anſwer to be in her Cuſtody, ſhould be brought before the Maſter, to remain in his Hands till further Order of the Court, and that the Defendant *Joan* the Mother ſhould be examined upon Oath, as to any other Copy of the ſaid Deed, and if there had been any other Copy made thereof, that was alſo to be delivered up, and the Defendant *Joan* to account for the Rents and Profits of the Premiſſes received by her or her late Husband, ſince the Death of *Katherine Naldred* the Aunt, who made the Settlement, and the Tenants of the Premiſſes were to attorn to the Plaintiff *Gilham*, and this to be binding to the Defendant *George Naldred* the Infant, unleſs he ſhould ſhew Cauſe within ſix Months after he came to Age; but no Coſts on either Side, unleſs the Defendant ſhould put the Plaintiff *Gilham* to further Trouble, and then the Plaintiff *Gilham* was to apply to the Court for his Coſts.

Caſe 169.

His Grace the Duke of Queensberry *and* Dover's *Caſe. (In Domo Procerum.)*

Since the Union a *Scotch* Peer made an *Engliſh* Peer, cannot by Virtue thereof ſit and vote in Parliament.

THE late Queen *Anne* by Letters Patent, dated the 26th of *May* in the ſeventh Year of her Reign, created *James* then Duke of *Queensberry* (the preſent Duke's Father) Baron of *Rippon*, Marquiſs of *Beverly*, and Duke of *Dover*, To hold theſe Titles and Dignities to him for Life, and afterwards to his ſecond Son *Charles* (the preſent Duke) then Earl of *Solloway* in *Scotland*, and the Heirs Male of his Body, Remainder to the third Son *George Douglaſs* and the Heirs Male of his Body, Remainder to the fourth Son, *&c.* in Tail Male ſucceſſively (the eldeſt Son of the late Duke being an Ideot, and therefore paſſed by in the Patent.)

In Purſuance of this Patent, a Writ iſſued to ſummon the late Duke to Parliament, who was accordingly on the 19th of *November* 1708 introduced into the Houſe of Lords, where he took his Seat, and continued to ſit and vote in two ſucceſſive Parliaments, no Objection being made to ſuch his Right at any Time during his Life.

The late Duke died during the Infancy of the preſent Duke, who coming to Age petitioned the King to cauſe a Writ of Summons to be iſſued to him for his coming and voting in Parliament.

And on the 18th of *December* 1719. his Majeſty referred it to the Houſe of Peers, to take the Petitioner's Claim and Right into Conſideration, and to do and determine thereupon what ſhould be found juſt and Right.

Upon this the Houſe of Peers gave Leave that the preſent Duke of *Queensberry* ſhould be heard at the Bar of the Houſe by his Counſel.

And the Difficulty was, that in the late Duke of (*a*) *Hamilton*'s Caſe it was reſolved by the Lords, "That "no Patent of Honour granted to any Peer of *Great* "*Britain* who was a Peer of *Scotland* at the Time of "the Union," ſhould intitle him to ſit in Parliament.

(*a*) Die Jovis 20 Decembris, 1711.

This Reſolution was founded on the Conſtruction of the Articles of (*b*) Union of the two Kingdoms of *England* and *Scotland*, after which Union the Patent of the Dukedom of *Dover* was granted to the Duke of *Queensberry* in Manner above mentioned.

(*b*) 5 Annæ, cap. 5.

The Articles of Union affecting this Caſe were the 4th, 22d and 23d.

By the fourth Article it is enacted, "That from "the Time of the Union there ſhall be a Communi"cation of all Rights and Privileges belonging to each "Kingdom, except where it is otherwiſe expreſly a"greed by the Articles."

By the 22d it is agreed, "That by Virtue of the "Treaty of Union, ſixteen ſhall be the Number of the "Peers of *Scotland* to ſit and vote in Parliament," and there the Method of chuſing theſe ſixteen Peers is preſcribed.

By the 23d Article it is agreed, "That theſe ſix"teen Peers thus elected ſhall have all the Privileges "of the Peers of Parliament of *Great Britain*. Alſo "that all the reſt of the Peers of *Scotland* ſhall have

" all the Privileges of the Peerage of *England*, excepting " only that of ſitting and voting in Parliament.

And it was urged in Favour of the Petitioner, that in theſe Articles it was difficult to find out Words which could be thought to diſable the King from granting to a *Scotch* Peer a Patent of Peerage of *Great Britain* with the Privilege of Sitting in Parliament, or which diſabled a *Scotch* Peer from accepting ſuch a Patent. Eſpecially, when the Rule of Law was, (and it was a Rule without Exception) that the Prerogative of the King, of which the Law was ſo regardful, could not be taken away by any Act of Parliament without plain and expreſs Words; more eſpecially ſo valuable a Part of the Prerogative whereby the Crown was enabled to encourage the Merit of the Subjects, by beſtowing on them Honours and Titles.

The Words of the Articles ſeemed ſo far from importing any ſuch Diſability, that there was not ſo much as a Negative in any of the Articles: There was indeed what ſeemed to be the Reverſe of this Conſtruction, the *fourth Article* ſaying, " There ſhall be " a Communication of all Rights and Privileges be" tween the Subjects of either Kingdom, except where " it is otherwiſe expreſly agreed by the Articles." And there was nothing expreſſed to the Contrary in any of the Articles.

So that the Subjects of each Kingdom, without any Preference, Diſadvantage or Diſcouragement, were to be equally capable of the Sovereign's Favour; and ſurely the *Scotch* Peers were Subjects as well as others; and it was the Intention of theſe Articles to encourage the Subjects to do their beſt Service to their Sovereign.

It was admitted that by the Treaty of Union, only ſixteen were to repreſent the Peers of *Scotland*; but though in Virtue thereof, only ſixteen Peers were to be *elected*, yet this did not hinder, but that by Letters Patent more Peers might be created.

It was ſubmitted to their Lordſhips, whether it could be intended by the above mentioned Articles of Union, that thoſe *Scotch* Peers ſhould be in a worſe Condition than the meaneſt of their fellow Subjects; nay than the meaneſt of their own Servants; in a worſe Condition than thoſe who are no Subjects, but *Aliens*; nay worſe than Criminals; ſince by ſuch Conſtruction of the Articles as would diſable Peers of *Scotland* from ſitting here by Letters Patent, all thoſe Things before mentioned were implied; for,

It was in the Power of the King (if it was his Pleaſure ſo to do) to make a Servant of a *Scotch* Peer a Peer of *Great Britain*; and then it were pretty ſtrange that the King ſhould not be able to make the Maſter ſo. It was in the Power of the King, for ſuch Merits as he alone was Judge of, to beſtow Honours upon the meaneſt of his Subjects. It was in his Power to make an Alien born, firſt a Denizen and then a Nobleman. It was the Crown's Prerogative to pardon a Criminal: And if it were the Royal Pleaſure, and ſuch Criminal ſhould have done Service to the Crown (of which the Crown alone was to judge) ſuch Criminal might be made a Peer.

And it ſeemed harſh to ſay, that a Nobleman of *Scotland*, by all the Services of his Life, could not make himſelf capable of becoming a Peer of *Great Britain*, and of voting in Parliament by Virtue of a Patent; but that if he were to commit Treaſon, and to be attainted, by which he would forfeit his *Scotch* Peerage, and then were to be pardoned; from the Time of ſuch Pardon he would be capable of being a Peer of *Great Britain* with the full Privilege of ſitting in Parliament.

But whatever Conſtructions theſe Things might receive, the Principal Caſe was out of the Articles of Union, and (probably) a different Caſe from that of any other Peer of *Great Britain*. The preſent Duke of *Dover* not taking this Dukedom as Heir to his Father by Deſcent, but by Virtue of a Remainder limited thereof to him as the ſecond Son of his Father, the late Duke of *Queensberry*.

That it muſt be admitted, the Patent of Dukedom was limited in Remainder to the ſecond Son, by his then Title of Earl of *Solloway*; and the pretended Diſability againſt his having the Privilege of ſitting in this Houſe as an *Engliſh* Peer, and as Duke of *Dover* was, that at the Time of the Union he was a *Scotch* Peer, (*viz.*) Earl of *Solloway*.

Whether a Peerage granted to an Infant may be waived by him when he comes of Age.

Now the Honour of the Earldom of *Solloway* was granted to him when an Infant: And it was ſaid to be a Rule of Law, that in Caſe of an Infant, a Grant made to him during his Infancy, might be waived and diſclaimed by him when he came of age. And the known Diverſity was, that what came to an Infant by Deſcent (which was the Gift of Law) That he could not waive; but whatever came to the Infant by the Gift or Grant of another, might be relinquiſhed by him when of Age.

Alſo it was ſaid to be plain, that whatever an Infant did waive or refuſe when of Age, it then became the ſame thing as if the Grant had never been made to him. Thus an Infant when of Age might refuſe any Eſtate given to him during his Infancy; and the Reaſon of the Law was, for that it might be more for the Infant's Benefit to be without the Eſtate or Grant, (which proved to be this very Caſe) and no Acceptance of an Infant ſhould bind him.

That for the ſame Reaſon if a common Perſon (and it holds as ſtrongly if the King) ſhould make a Leaſe for Years, or grant Lands in Fee to an Infant, he, when of Age, might waive and refuſe it; ſince the Rent reſerved might be more than the Value, the Eſtate might be more incumbred than it was worth.

Now a Grant of Peerage was within the ſame Rule of Law in this and other Reſpects as a Grant of Land: A Dignity or Barony was intailable within the Words [Lands and Tenements] and comprized therein. 1 *Inſt.* 20. Again, a Dignity or Barony, though intailed, was comprized within the Statute of 26 *H.* 8. *cap.* 17. by the Words [Lands, Tenements and Hereditaments;] and therefore was, though intailed, forfeitable for Treaſon; and generally ſpeaking, Dignities and Honours were governed by the ſame Rules of Law, as Lands, ſome few Inſtances only, for particular Reaſons excepted.

Conſequently, as an Infant when of Age might refuſe or waive a Grant made to him of Lands, ſo might he refuſe a Grant of an Honour made to him during his Infancy, and exactly for the ſame Reaſon; for an Honour might be loaded with an Incumbrance as well as Land: And in the principal Caſe (as ſome would have it) the *Scotch* Peerage from the Time of the Union was in Fact clogged and loaded with a great Incumbrance, ſuch an Incumbrance as was a perpetual

Diſability to the Peer and his Iſſue in all ſucceeding Generations from ſitting in this Houſe.

Wherefore it was plainly for the Benefit of his Grace the Duke of *Dover* (who had two Honours granted him during his Infancy, one of which, the *Scotch* Peerage, was inconſiſtent with the *Engliſh* one, and thought to diſable the Duke from ſitting in this Houſe) to waive and refuſe ſuch *Scotch* Peerage granted him during his Infancy, and by accepting of the Dukedom of *Dover*, to elect to ſerve the Sovereign in that Capacity, which ſeemed to take in all that was implied in the other, and more.

It muſt indeed be admitted that the King was intitled to the Service of his Subject in what Capacity he pleaſed; but an Infant could not vote in this Houſe, during his Minority; and now upon the Duke's firſt attaining his Age, as the Crown had elected that he ſhould ſerve as an *Engliſh* Peer and Duke of *Dover*, he was ready to do ſo, not having been able to ſit in this Houſe before, or when an Infant.

The Counſel further obſerved, it would hardly be expected from them, that they ſhould ſhew a Precedent where an Infant when of Age had waived an Honour granted to him during his Infancy; it not having been uſual (unleſs in the Royal Family) for the Crown to beſtow Honours upon Infants.

That in the old Books there were ſeveral Inſtances of Noblemens reſigning and ſurrendering their Honours (*a*), though accepted by them after their coming to Age, and though deſcended to them: But in the principal Caſe they did not go ſo far; they only held that an Honour granted to an Infant might be waived by him when of Age. That this being agreeable to the known Rules of Law in Relation to Eſtates granted to

(*a*) See Caſes in Parliament, Lord *Purbeck*'s Caſe.

to Infants, it ſeemed incumbent on the other Side who oppoſed the Duke's ſitting in the Houſe, to produce Precedents, ſhewing that an Infant could not waive an Honour as well as Land granted to him during his Infancy.

However they ſhould cite one Caſe, That of the Lord *Abergavenny*, 12 *Co.* 70. Where *Edward Nevil* in the ſecond and third of Queen *Mary* was called by Writ to Parliament by the Title of Lord *Abergavenny*, and dying before the Parliament met, it was reſolved 8 *Jac.* 1. by the Lord Chancellor, the two Chief Juſtices, Chief Baron and diverſe other Judges then preſent in the Houſe of Peers, that Lord *Abergavenny* was no Baron; becauſe by the King's Command the Writ might be ſuperſeded or countermanded, or the Party *might excuſe himſelf to the King, or might have waived it and ſubmitted himſelf to a Fine*; as where one diſtrained to be a Knight, or one learned in the Law is called to be a Serjeant; the Iſſuing of the Writ alone cannot make the one a Knight or the other a Serjeant, ſince either may excuſe himſelf, or ſubmit to a Fine, or die before the Return of the Writ. So that from this Caſe it was ſaid to appear that the Party, *though of Age*, might refuſe being made a Peer; and if ſo, much more when an Infant. And taking it that ſuch Grant of an Honour made to an Infant might be waived, it then muſt plainly relate to the Time of making the Grant, and not to the Time of the Waiver only; as if a Leaſe for Years be made to an Infant, rendring Rent, and the Infant when of Age waives it, this plainly diſcharges him of all the Arrears of Rent; whereas if the Eſtate were deveſted only from the Time of the Waiver, then the Infant when of Age muſt pay the Rent till the Time of the Waiver; which was plainly otherwiſe.

Wherefore as the Waiver of the Honour related to the Time of making the Grant, it follow'd that the Duke of *Queenſberry* and *Dover*, as ſoon as he came to Age, having waived the Grant of the *Scotch* Peerage, his Grace was upon the Matter never Earl of *Solloway*, and ſo not a *Scotch* Peer at the Time of the Union; conſequently he was capable of being made an *Engliſh* Peer, and not in any Senſe within the Reſolution of the Duke of *Hamilton's* Caſe.

But ſuppoſe the Determination ſhould be againſt the preſent Duke's Claim, yet if he ſhould happen to die without Iſſue Male, his younger Brother *George* would plainly be intitled; for the Dukedom of *Dover* being limited by the ſame Patent after the Death of the late Duke of *Queenſberry*, to his ſecond and third Sons ſucceſſively in Tail Male, they both took their Dukedom by Purchaſe and not by Deſcent; and conſequently if the preſent Duke, the ſecond Son, ſhould die without Iſſue Male, the third Son *George*, who was not a *Scotch* Peer at the Time of the Union, would be plainly intitled to the Dukedom of *Dover*, with the Privilege of ſitting in this Houſe. And it ſeemed pretty ſtrange to ſay that the Elder Brother ſhould not have ſuch Privilege, but that all his younger Brothers ſhould; eſpecially when all the Brothers claimed under the ſame Patent of Honour.

Much more was ſaid to diſtinguiſh this Caſe from the Reſolution in that of the Duke of *Hamilton*; and it was urged that there was no more Reaſon the Reſolution in the Duke of *Hamilton*'s Caſe ſhould preclude them from ſpeaking againſt it, than that the Reſolution in Favour of the late Duke of *Queenſberry* ſhould preclude any from controverting that. But that rather a Reſolution in Favour of a Peer, and allowing him to ſit and vote in

Parliament, was ſtronger and more to be regarded than a Reſolution to the Contrary; ſince the noble Peer, who by Virtue of any Reſolution came into this Houſe, might poſſibly by his Votes and Debates occaſion ſeveral Reſolutions which otherwiſe might not have been; and if it ſhould be afterwards determined that ſuch Peer had no Vote, the Suitor whoſe Cauſe was loſt by the Vote or Debate of ſuch Peer, muſt think himſelf very unfortunate. But on any Reſolution of the Houſe againſt the admitting a Peer to ſit and Vote, that terminated only in himſelf, and affected no third Perſon, as the other Caſe would; ſo that this Reſolution in Favour of the Duke of *Queenberry*'s Patent, and admiting him to ſit and vote, though it were only one ſingle Reſolution, would ſtill be ſtronger than the Reſolution in the Duke of *Hamilton*'s Caſe.

Upon the whole Matter: As the Patent under which the preſent Duke of *Queensberry* and *Dover* claimed a Right to ſit in this Houſe had been allowed in his Father's Time: As his Father to the Time of his Death, in two ſucceſſive Parliaments did ſit and Vote here, and no Objection could be made to the preſent Duke's Claim, but what might likewiſe have been made againſt that of his Father: So it was hoped the Houſe would be of the ſame Opinion, as to the Son's ſitting among them, as their Lordſhips had been of in the Caſe of his Father, it being upon the ſame Patent. And as his Grace ſucceeded his Father in his Honour, ſo their Lordſhips would admit his Grace to ſucceed his Father in his Seat in that Houſe which was belonging to the Honour.

But upon the Debate of the Queſtion, the Majority of the Peers were againſt allowing the preſent Duke the Privilege of ſitting in their Houſe.

The Lord *Cowper* was of Opinion that the King could not create a Subject a Peer of the Realm againſt his Will; becauſe then it might be in the Power of the King to ruin any Subject whoſe Eſtate and Circumſtances might not be ſufficient for the Honour.

The Lord *Trevor contra:* That the King had a Right to the Service of his Subjects in any Station he thought proper, and inſtanced in the Caſe of the Crown's having Power to compel a Subject to be a Sheriff, and to fine him for refuſing to ſerve.

Alſo the Lord *Cowper* held that a Minor might waive, when of Age, a Peerage granted to him during his Infancy; eſpecially in this Caſe, it being a *Scotch* Peerage, and amounting to no more than a Grant of a Diſability. But

The Lord *Trevor* obſerved, that in Lord *Abergavenny*'s Caſe it was admitted the King might fine a Perſon whom his Majeſty thought fit to ſummon by Writ to the Houſe of Peers, it being ſaid there, that a Perſon might chuſe to ſubmit to a Fine; and if it were allowed the King might fine one for not accepting the Honour and not appearing upon the Writ, the King might Fine *toties quoties*, where there was a Refuſal, and conſequently might compel the Subject to accept of the Honour.

And that it was not to be preſumed the King would grant a Peerage to any one to his Prejudice or Wrong, any more than that he would make an ill Uſe of his Power of pardoning; all which are Suppoſitions (*a*) contrary to the Principles upon which our Conſtitution is framed, which depends upon the Honour and Juſtice of the Crown.

In this Caſe I was of Counſel with the Duke of Queensberry, *&c.*

(*a*) See Lord Keeper *Sommers*'s Argument in the Bankers Caſe, *Page* 127.

Fawkes verſus *Pratt*.

Caſe 170.
Lord Chancellor Parker.
They only are Defendants to a Bill, againſt whom Proceſs is prayed.

THE Plaintiff was a Bankrupt, and brought a Bill againſt his ſuppoſed Debtor the Defendant *Pratt*, to compel him to Account.

The Defendant pleaded that the Plaintiff being a Bankrupt, and found ſo by the Commiſſioners, his Effects were aſſigned to *A.* and *B.* for the Benefit of the Creditors, and that the ſaid Aſſignees ought to be made Parties.

Upon this the Plaintiff having an Order for that Purpoſe, amended his Bill, and in the Body thereof charged the Aſſignees in a proper Manner; but the Prayer of Proceſs was (as before) only againſt the Defendant *Pratt*. After which the Defendant put in the ſame Plea to the Bill, (*viz.*) that the Aſſignees ought to be made Defendants.

Lord Chancellor: The Plaintiff may complain and tell Stories of whom he pleaſes; but they only are Defendants againſt whom Proceſs is prayed, and no Proceſs being prayed againſt the Aſſignees, they ſtill are not Defendants, conſequently the Plea is good.

Upon the Attorney's or Solicitor's appearing to be Guilty of a groſs Neglect, the Court will order him to pay the Coſts.

But the Solicitor (who was in Court) pretending that the Record was right, which appeared afterwards not to be ſo, and the Plaintiff being a poor Man and in Priſon, and this ſeeming to be the groſs Neglect of the Solicitor, the Plea was allowed, and the Bill thereupon amended; but the Coſts were ordered to be paid by the Solicitor.

Caſe 171.
Lord Chancellor Parker.

Bowers verſus *Littlewood*.

One dies Inteſtate leaving an Uncle and a deceaſed Aunt's Son; the latter ſhall have no Share under the Statute of Diſtribution.

ONE died Inteſtate, leaving no Wife or Child, Brother or Siſter; but his next of Kin were an Uncle by his Mother's Side, and a deceaſed Aunt's Child.

The latter brought a Bill againſt the Uncle for a Share of the Inteſtate's Eſtate; to which Bill the Defendant demurred.

For the Plaintiff it was inſiſted that upon the reading the Satute of 22 *Car.* 2. *cap.* 10. which ſays, That "where the Inteſtate leaves no Wife or Child, the Perſonal Eſtate ſhall go to the next of Kin, and their legal Repreſentatives; Provided there ſhall be no Repreſentation amongſt Collaterals, after Brothers and Siſters Children," Lord *Cowper* had inclined to think that *Brothers and Siſters Children* ſhould refer to the Word [Collaterals] ſo that the Child of any Collateral Brother ſhould take by Repreſentation with the Uncle or Aunt of ſuch Child; and it was ſaid that this was called a Statute of *Diſtribution*, as intended to be diffuſive in diſtributing the Inteſtates Effects, to prevent any ſingle Hand from ſweeping away the whole Perſonal Eſtate; and to diſpoſe of it ſo as that all the near Relations of the Inteſtate might be provided for, by which Conſtruction the Statute would do the moſt Good; that it would be hard the Inteſtate's Uncle's Son by the Father's Side who bears the Name, ſhould be quite excluded by an Aunt of the Mother's Side, married (it may be) to a Stranger; that as to *Pett*'s Caſe (*a*), where the Inteſtate left a deceaſed Brother's Child, and a deceaſed Brother's Grandchild, upon which it was adjudged that the Grandchild (the Inteſtate's Grand Nephew) ſhould not take, this

(*a*) Ante 28.

this might be admitted; becauſe the Proviſo ſays, "there "ſhall be no Repreſentation among Collaterals after Bro"thers and Siſters Children," and there was a Grandchild of a Brother, who by the expreſs Words was excluded.

Lord Chancellor: In *Pett*'s Caſe, the Grandchild was Nephew to the Perſon with whom he claimed to come in for a Share, but yet the latter took the whole. Wherefore that is a Caſe in Point; and indeed I apprehended this Matter to have been ſettled, and that the Practice in the Spiritual Court had been conformable thereto. What has been urged with Regard to the Hardſhip of the Caſe is nothing; for ſo it may ſeem hard that if an Inteſtate leaves a deceaſed Brother's only Son, and ten Children of a deceaſed Half-Siſter, the ten Children of the deceaſed Half-Siſter ſhall take ten Parts in eleven with the Son of the deceaſed Brother; and yet the (*a*) Law is ſo, becauſe they all take *per Capita*, and not by Way of Repreſentation.

(*a*) See the Caſe of *Walſh* verſus *Walſh*, Precedents in Chancery 54, determined, as it is there ſaid, by Lord *Sommers* on great Deliberation.

Wherefore the Court allowed the Demurrer.

Mayor and Aldermen of Colcheſter verſus ------

Caſe 172.

Lord Chancellor Parker.

The Court cannot make an Order to examine a Plaintiff *de bene eſſe*, ſaving juſt Exceptions, tho' they will make ſuch Order to examine a Defendant; but the Defendant ought to have demurred to ſuch immaterial Plaintiff. If a Corporation would make uſe of one of their own Members as a Witneſs, they muſt disfranchiſe him.

THE *Plaintiffs* moved to examine ſome of the Co-Plaintiffs, ſaving juſt Exceptions; and the *Defendant* made the like Motion.

Lord Chancellor: If a Corporation will examine any of their Members as Witneſſes, they muſt (and ſo is the Courſe) disfranchiſe them, and then they may make uſe of their Teſtimony; but upon his Lordſhip's conſulting with the Regiſter, it appeared to be a Rule, that no Co-Plaintiff ought to be examined as a Witneſs on Behalf of the Plaintiff; there being this apparent Exception againſt him, (*viz.*) his being liable to anſwer Coſts, if the Event of the Cauſe ſhould prove againſt him.

But by *Lord Chancellor*, there is more Reaſon that the Defendant ſhould be at Liberty to examine one of the Plaintiffs in this Cauſe. *Firſt*, Becauſe the Defendant cannot disfranchiſe any of the Corporation, as the Plaintiff may. *Secondly*, If the Plaintiff ſwears any Thing againſt himſelf, it is good Evidence *againſt* him, though nothing that he ſwears can be Evidence for him.

Nevertheleſs the Practiſe is otherwiſe; and this ſeems to be in Imitation of the Common Law, where the Defendant cannot examine the Plaintiff; and though Equity goes ſo far as to give either Side leave to examine a *Defendant de bene eſſe*, yet this Rule has not been extended to a *Plaintiff*, who if he be an immaterial Plaintiff, the Defendant may demur.

Note; The Method of disfranchiſing is by an Information in nature of a *Quo Warranto* againſt the Member, who confeſſes the Information, on which the Plaintiff obtains Judgment to disfranchiſe.

DE

Term. S. Hillarii,

1719.

All Souls College verſus *Coddrington, & econtra.*

Caſe 173.
At the Rolls.

COlonel *Coddrington* deviſed to *All Souls College* in *Oxford* in theſe Words, *I deviſe my Library of Books now in the Cuſtody of Mr.* Carſwell, *to* All Souls College *in* Oxford; and in the ſame Will he deviſed to the ſaid College 4000 *l.* more to augment their Library. After which the Teſtator bought ſeveral Books of Value which were placed in the ſaid Library.

A. deviſes his Library of Books now in the Cuſtody of *B.* to a College, and afterwards buys more Books which he places in the ſame Library, and gives 4000 *l.* more to increaſe their Library; the after-bought Books ſhall paſs.

Objected, That the Books purchaſed afterwards ſhould not paſs; becauſe the Gift is of his Library of Books *now* in the Cuſtody of *Carſwell*, which Word [now] muſt be relative to the Time of making the Will, otherwiſe muſt be rejected; but it was ſaid to be againſt an eſtabliſhed Rule in the Conſtruction of Wills, to reject any Word that can be made to take Effect; it was admitted that without the Word [now] the Will, as to the perſonal Eſtate, would relate to the Time of the Death of the Teſtator; *ſecus* where that Word was inſerted; that if I ſhould deviſe all the Leaſes which I now have, or all the Horſes which I now have in my Stable, and afterwards purchaſe more of each, theſe new Leaſes or Horſes would not paſs.

Maſter of the Rolls: Where I deviſe all the Corn *now* in my Barn, if that Corn be afterwards ſpent, and new Corn put in, ſuch new Corn will not (*a*) paſs: But if I deviſe all my Flock of Sheep *now on ſuch a Hill, or in ſuch a Paſture*; in that Caſe, becauſe Sheep are in their Nature fluctuating, ſome muſt die, ſome be killed, and ſome Lambs be produced which will afterwards breed, and it being the Caſe of a collective Body, the Sheep produced afterwards ſhall paſs; and this is within the Reaſon of a Deviſe of a Perſonal Eſtate, which, becauſe always fluctuating, ſhall therefore relate to the Time of the Teſtator's Death; beſides the Will, as to Perſonals, does not ſpeak till after the Teſtator's Death.

(*a*) Vide autem Swinb. 448. contra.

Vide ante *Maſters* verſus *Maſters*, and *Wind* verſus *Jekyll* & *Albone*, 575.

It is natural to think that the Teſtator did not in the Principal Caſe intend his Executor ſhould be garbling the Library after his Death, by picking out the Books bought ſince the making the Will, which appears more plainly from the ſubſequent Deviſe of 4000 *l.* to the College to buy Books, ſo that his Deſign manifeſtly was to *increaſe* rather than *diminiſh*.

As to the Caſes that have been put of a Deviſe of all the Leaſes which I now have, or of all the Horſes now in my Stable, and afterwards I purchaſe more of each, the new Leaſes or Horſes will not paſs; the Reaſon is becauſe theſe are particular Chattels, and not Part of a collective Body as a Flock of Sheep, or Library of Books. Indeed a Flock of Sheep differs ſomewhat from a Library of Books; for the former muſt of Neceſſity fluctuate as above; but there is no Neceſſity that Books ſhould be changed.

However in this Caſe it was decreed that the Books afterwards bought by the Teſtator, and put into this Library, ſhould paſs to the College by the Will; the Court being of Opinion that the Word *Now* did not relate to the Books which were in the Library at the Time of making the Will, but, on Conſtruction of the whole Sentence, denoted where the ſaid Library was, and might be intended to diſtinguiſh it from any other Library of the Teſtator's.

Attorney General verſus *Wyburgh & al'.*

Caſe 174.

Lord Chancellor Parker.

In a Suit on Behalf of a Charity for the Arrears of a Rent-Charge, not neceſſary to make all the Ter-tenants of the Land out of which the Rent iſſues, Parties.

ONE charges all his Lands in *Chigwell* in *Eſſex*, and in *Endfield* in *Middleſex* with 20 *l. per Annum* to the Poor of *Endfield.* And an Information being brought to make diverſe Lands in *Endfield* liable to the Charity, leaving out the *Chigwell* Lands, it was objected, that the *Chigwell* Lands ought to contribute, and the Owners thereof be made Parties.

Lord Chancellor: This is in Nature of a Plea in Abatement, and unleſs it be inſiſted on in the Anſwer, and the particular Owners ſhewn, I will put the Owners of the *Endfield* Lands to take the labouring Oar on themſelves to find out the *Chigwell* Lands, and bring their Bill for that Purpoſe if they think fit; for at this Diſtance of Time, (the charitable Gift being in 1651.) the Lands may be loſt, or not diſtinguiſhable, or purchaſed without Notice; and if the Charity has loſt the *Chigwell* Lands, it would be ſtrange to make Uſe of this as a Reaſon, why it ſhould loſe the *Endfield* Lands likewiſe.

Pariſhioners no Good Evidence to prove a Charity given to the Pariſh. *Secus* if only a Lodger, and one that does not pay to the Poor. But to be intended a Houſe-keeper, and to pay, &c. unleſs the Contrary be made appear.

Alſo Part of this Charity being given for the Cloathing of ſix poor Perſons of the Pariſh of *Endfield*, *Lord Chancellor* would not ſuffer any of the Inhabitants of *Endfield* to be Witneſſes, becauſe they were intereſted, as being eaſed in the Poor Rates; and though it was urged, that they might be Lodgers there, or Perſons not contributing to the Rate, and that it was incumbent on thoſe who took the Exception, to make out the Contrary;

Tamen per Cur': The Witneſs being deſcribed to be of the Pariſh of *Endfield*, Yeoman, muſt be intended an Houſe-keeper, and one liable to pay Pariſh Rates, unleſs the contrary be made to appear.

Wherefore it was ſent to the Maſter to inquire whether the Lands were liable to the Charity.

Caſe 175. *Lord Chancellor* Parker.

Blackborn verſus *Hewer Edgley*, & *econtra*.

MR *Hewer* late of *Clapham*, being a ſingle Man, and having a vaſt Real and Perſonal Eſtate, and a near Relation, *Anne* the Wife of *Samuel Edgley*, for whom and whoſe Iſſue he intended the Bulk of his Eſtate; by Will, dated the 9th of *September* 1715. after having declared his Intention that his Name and Family ſhould be continued by ſome of the Children of his Couſin *Anne Edgely*, directs that his Manner of Houſe-keeping at his Dwelling-Houſe at *Clapham* ſhould be continued for one Year after his Death, as alſo his Servants at the old Salary, and that 1200 *l. per Annum* ſhould be allowed his Couſin *Anne Edgley* for that Purpoſe; that after the Expiration of that Year his Couſin *Anne Edgley*

Edgley ſhould continue to live at his Houſe at *Clapham*, and that her Son *Hewer Edgley* ſhould cohabit with her there, in the ſame Manner as he then did with the Teſtator; that the ſaid *Anne Edgley* ſhould be at all the Charge of Houſe-keeping, Servants Wages and Coach-Horſes to the Number that he maintained; and to enable her ſo to do, he directed that 1200 *l. per Annum* ſhould be paid to her by quarterly Payments for her Life; and that in Caſe her Son *Hewer Edgley* ſhould marry, and his Mother the ſaid *Anne Edgley* ſhould think fit to live from him, and to quit the Houſe and Furniture, then ſhe to have 250 *l. per Annum* for Life; and he deviſed all his Freehold Eſtate, and alſo the Reſidue of his Perſonal Eſtate to Truſtees, their Heirs, Executors and Adminiſtrators, in Truſt to convey all his Freehold Eſtate to the ſaid *Hewer Edgley* for Life, without Waſte, Remainder to Truſtees during his Life, to preſerve contingent Remainders, Remainder to his firſt, *&c.* Son in Tail Male, Remainder to his Daughters in Tail General as Tenants in Common, with Power to the ſaid *Hewer Edgley* to make a Jointure of any Part not exceeding half the Premiſſes: And if *Hewer Edgley* ſhould die without Iſſue, then he deviſed that the Premiſſes ſhould be ſettled in Fourths, (*viz.*) one Fourth to his Couſin *John Blackborn* in Fee, another Fourth to his Couſin *Abraham Blackborn* in Fee, another Fourth to his Couſin *Anne Jackſon* in Fee, and the remaining Fourth to his Couſin *Suſanna Edgley*, youngeſt Daughter of the ſaid *Anne Edgley*, in Fee. And in Caſe all or any of the ſaid four Remainder-Perſons ſhould be dead at the Time, when by Virtue of the ſaid Settlement his Eſtate was to devolve upon them, then the fourth Part, to which the Perſon ſo dead ſhould have been intitled to, if living, ſhould be conveyed to the reſpective Heirs of the Perſon ſo dead; and deviſed the Reſidue of his Perſonal Eſtate (ſubject to the aforementioned Legacies) to be laid out in Land and ſettled in the ſame Manner as he had before deviſed his Real Eſtate, and made his Truſtees Executors, and died.

The Teſtator was ſeiſed in Fee of ſome little Land by him always imployed for the producing Hay and Corn which was conſtantly ſpent in the Houſe, and the Land was plowed with the Coach-Horſes which the Teſtator kept.

The Kinſman *Hewer Edgley* married the Daughter of Sir *Simeon Stuart*, and he and his Wife were not inclined to live with the Mother Mrs. *Anne Edgley* at the Houſe at *Clapham*; *Hewer Edgley* appointed a Jointure to his Wife, exceeding a Moiety of the Premiſſes, and *Suſanna Edgley*, one of the four Deviſees in Remainder, died without Iſſue unmarried.

Samuel Edgley the Father of *Hewer*, prepared a Bond for *Hewer Edgley* to ſign for the Payment of 120*l. per Annum* to the Father for Life, which the Son for ſome Time declined to execute, ſaying it was more reaſonable that the Father ſhould depend upon his Honour: Upon which the Father left the Bond with him, declaring if he would not ſign it, he might let it alone. But afterwards *Hewer Edgley* the Son, in the Abſence of the Father, juſt before he went to travel, did ſign it, and directed that it ſhould be delivered to his Father.

In this Caſe the following Points were debated, and reſolved by the Lord Chancellor.

Firſt, It was objected, that though the Houſe at *Clapham* paſſed to the Mother for her Life if ſhe would live there, yet only the Houſe and Curtelage would paſs, and not the Land imployed for the producing Hay and Corn, *&c.* and the rather, becauſe all his

Lands and Freehold Eſtate were deviſed elſewhere, to Truſtees for the Couſin *Hewer Edgley* for Life, *&c.*

Sed per Cur': By the ſame Reaſon it might be objected that the Houſe at *Clapham* is deviſed away, which however is not pretended. It is true, that by the Grant or Deviſe of an Houſe *with the Appurtenances*, only the Garden and Orchard will paſs with the Houſe; but the Deviſe of the Houſe *with the Lands appertaining*, will paſs the Land in Queſtion. Now the Intention of the Teſtator was, that after his Death, during the Life of his Kinſwoman *Anne Edgley*, every Thing ſhould be carried on and tranſacted as it was in his Life-Time, and this to ſuch a Nicety, as that the ſame Number of Servants and even of Coach-Horſes was to be imployed, the ſame Hoſpitality obſerved, the ſame Horſes uſed in plowing the Lands; which could not be, unleſs the Lands were to continue as before to be enjoyed with the Houſe; wherefore as it ſeems to have been his Intention not to part them, let thoſe Lands which were before conſtantly enjoyed with the Houſe, and the Profits whereof were applied to the Maintenance of the Houſe, continue to be ſo enjoyed.

By a Deviſe of an Houſe *cum pertinentiis*, only the Garden and Orchard will paſs with it; but by a Deviſe of an Houſe with the Land appertaining thereto, the Land uſually occupied therewith will paſs. One deviſed that his Couſin *A.* ſhould continue to live at his Houſe, and be at the Charge of keeping the Houſe and the Servants, and Coach-Horſes which the Teſtator imployed in plowing the Ground, and ſpend the Corn ariſing thereon in the Houſe; here the Land enjoyed with the Houſe ſhall paſs to the Couſin *A.*

Secondly, It was inſiſted that it appeared plainly *Hewer Edgley* and his Wife and Family were to have the Liberty of cohabiting with, and being dieted by his Mother at this Houſe at *Clapham*; and therefore if he ſhould waive that, or elect to live from his Mother, this would exempt her from any Neceſſity of expending ſo much, and conſequently there ought to be a proportionable Abatement out of the 1200 *l. per Annum*, which was allotted to be paid to her for Houſekeeping.

Cur':

One deviſes an Houſe, and directs by Will that an Annuity of 1200 *l.* *per Annum* be paid to his Couſin, and that ſhe ſhall maintain her Son there; the Son chuſes to go from her; ſtill the Couſin ſhall have the 1200 *l.* *per Annum* in the ſame Manner as if the Son had died.

Cur': I admit *Hewer Edgley* might live at the Houſe at *Clapham* with his Mother as formerly he did with the Teſtator; but if he would live there with a greater Number of Servants or Horſes than were there in the Teſtator's Life-Time, it ſeems to me that his Mother is not bound to maintain them. She is only to maintain him in the ſame Plight and Manner as the Teſtator did; neither ought there to be any Abatement of the 1200 *l.* *per Annum* by Reaſon of the Son's Abſence, any more than there ought to have been for the Years that the ſaid *Hewer Edgley* travelled and was beyond Sea after the Teſtator's Death; and as though he had died, there ſhould be no Abatement of the 1200 *l.* *per Annum*, by the ſame Reaſon there ſhall be no Abatement in Reſpect of the voluntary Abſence of the ſaid *Hewer Edgley*; for the Teſtator intended that in all Events, during the Life of his Couſin *Anne Edgley*, there ſhould be the ſame Hoſpitality as in his Life-Time, only in Caſe *Anne Edgley* ſhould leave the Houſe (which was left intirely to her Election) then indeed ſhe was to have but 250 *l.* *per Annum*, inſtead of the 1200 *l.* *per Annum*; but this latter Sum was to be paid her very exactly, (*viz.*) quarterly during her Stay there; and Care is taken, that even the Repairs of the Houſe ſhall be paid out of the other Part of his Eſtate.

Thirdly, Objected that the Jointure made by *Hewer Edgley* on his Wife, exceeded a Moiety of the Premiſſes, and conſequently, having gone beyond the Power, was void.

A Settlement is directed to be made on *A.* with a Power to make a Jointure of a Moiety. *A.* before the Settlement makes a Jointure of what exceeds a Moiety; Court will take no Notice of this during the Husband's Life, for it may never take Effect.

Cur': Here neither is nor can be any Jointure, for as yet the Son *Hewer Edgley* has no legal Eſtate till the Truſtees convey to him, and until he has an Eſtate he can paſs none: Wherefore I can take no Notice of this equitable Appointment; nor can it properly come in Queſtion at this Time, not being to take Effect till after the Huſband's Death, and perhaps never will, as he may ſurvive his Wife.

Fourthly, Objected, that *Hewer Edgley* by Virtue of the Words [*if he die without Iſſue of his Body*] ſhould have an Eſtate-Tail in the Premiſſes, and then it would be in his Power to bar the Remainder by a Recovery; and this was the rather an Eſtate-Tail in him, for that otherwiſe the Daughters of his Son could never take, which would be againſt the Teſtator's Intention.

To which it was anſwered, that here was an expreſs Eſtate for Life limited to *Hewer Edgley*, and the Words [if he ſhould die without Iſſue] being only Words of Implication, would not merge and deſtroy an expreſs Eſtate for Life, according to *Bamfield* and *Popham*, *ante* 54.

But the Court exploded the Notion, that Words of Implication ſhould not turn an expreſs Eſtate for Life into an Eſtate-Tail, and ſaid, That if I deviſe an Eſtate to *A.* for Life, and after his Death without Iſſue, then to *B.* this will give an Eſtate-Tail to *A.* according to *Sunday*'s Caſe, 9 *Co.* 127. *b.* * But here being a Limitation upon *Hewer Edgley*'s Death to his Sons, and after to his Daughters, the following Words [*if* Hewer Edgley *ſhould die without Iſſue*] muſt be intended, if he ſhould die without (*b*) *ſuch Iſſue*. And as to what had been urged, that unleſs theſe Words were to create an Eſtate-Tail in *Hewer Edgley*, his Sons Daugh-

In a Deviſe of Land to *A.* for Life, and if *A.* die without Iſſue, then to *B.* tho' here is an expreſs Eſtate for Life to *A.* yet the ſubſequent Words will turn it into an Eſtate-Tail; but where Lands are deviſed to *A.* for Life, Remainder to Truſtees, &c. Remainder to his firſt, &c. Son in Tail Male, &c. and if *A.* dies without Iſſue, then, &c. This will not give an Eſtate-Tail to *A.* but the Words [without Iſſue] muſt be intended without ſuch Iſſue.

(*b*) *Vide* the Caſe of *Humberſton* verſus *Humberſton*, ante 332.

* *Sed Quære*, For in *Sunday*'s Caſe there is no expreſs Eſtate for Life given to the firſt Deviſee, ante 57.

Daughters could not take; it did not appear the Teſtator intended *Hewer Edgley*'s Sons Daughters ſhould take, for he might think that on *Hewer Edgley*'s dying without Iſſue Male, his Name and Family would be determined, for which Reaſon he might limit it over to the Daughters of *Hewer Edgley* himſelf; beſides the Son of *Hewer Edgley* would be Tenant in Tail, and when of Age might, by docking the Intail, give the Premiſſes to his Daughters.

One deviſes his Freehold Eſtate to Truſtees and their Heirs, in Truſt to convey the Premiſſes to his Son for Life, Remainder to his firſt, &c. Son in Tail Male ſucceſſively, Remainder to his four Daughters, to each one Fourth in Fee; and in Caſe any of his four Daughters die without Iſſue, the Truſtees to convey ſuch fourth Part in Fee, to the reſpective Heirs of the Perſon ſo dying; one of the Daughters dies without Iſſue, her Fourth in Equity belongs to her Brother, as her Heir.

Fifthly, Objected, that on the Death of *Suſanna Edgley* the Deviſee of one Fourth of the Premiſſes in Remainder, in Caſe *Hewer Edgley* ſhould die without Iſſue, her fourth Part was not to deſcend to her elder Brother and Heir at Law *Hewer*, but to be ſubject to an executory Deviſe to ſuch Perſon as would be Heir at the Death of *Hewer Edgley* without ſuch Iſſue as aforeſaid, and not to veſt in the mean Time.

Cur': This Remainder in Fee of a fourth Part does veſt in *Hewer Edgley* as Heir of his deceaſed Siſter *Suſanna*; for ſhe having a Deviſe of the fourth Part to her in Fee, the Words directing a Conveyance to be made in Caſe of her Death to her Heir, are no more than what would have been otherwiſe implied, *& expreſſio cor' quæ tacitè inſunt nihil operatur.*

Sixthly, Neither is the Furniture of the Houſe at *Clapham* to be ſold, while Mrs. *Anne Edgley* ſtays there; for it being ſaid by the Will, that if ſhe thinks fit on the Marriage of *Hewer Edgley* to quit the Houſe and Goods, this ſhews that until then ſhe was to enjoy them. But the Words are not ſtrong enough to carry the Goods as Heir-Looms with the Houſe after Mrs.

Anne Edgley ſhould quit it or die; then they ſhall be ſubject to the Truſts of the Will.

Seventhly, As to the Son's Bond to pay the 120 *l. per Annum* to his Father; the Words ſaid by the Father [that if the Son would not ſign it he might let it alone] might be ſpoken in ſuch a Manner as to amount to a Threatning, and with Deſign to intimidate the Son; but it might alſo be otherwiſe; and the Son having ſaid that this ought to be left to his Honour, the Father ſeems to have acquieſced under it; after which the Son as bound in Honour, without the Privity of his Father, and in his Abſence executed the Bond, and directed it to be delivered to his Father; ſo that for ought appears it was his free Act, and what he thought himſelf obliged in Honour to do; and therefore, without any Proof to impeach it, ſhould not be ſet aſide in Equity.

A Son in plentiful Circumſtances, gives his Father a Bond to pay him 120 *l.* Annuity for his Life; if done freely and without Coercion, good, and what Words or Circumſtances will not be conſtrued a Coercion.

Loyd verſus *Read*.

Caſe 176.

Lord Chancellor Parker.

A Grandmother put 100 *l.* into the Exchequer upon the (*a*) Act which gives 14 *l. per Cent.* Annuities for Lives, and her Grandchild being made Nominee, the Father of the Grandchild gave a Bond to the Grandmother to repay her this 100 *l.* in Caſe the Child ſhould die in the Life of the Grandmother.

(*a*) 5 & 6 *W. & M. cap.* 20.

Grandmother buys an Annuity in 14 *l. per Cents* for 100 *l.* in the Grandchild's Name. Child's Father gives the Grandmother a Bond to repay the 100 *l.* if the Child dies before the Grandmother, who receives the Income and keeps the Talley, the Grandchild making no Claim: This no Truſt for the Grandchild.

The Talley was kept, and the Income of this Annuity received by the Grandmother during her Life, and diſpoſed by her Will, from this to another Grandchild.

Decreed by *Lord Chancellor*, That the Grandmother's receiving the Income of this Annuity during her Life, and keeping the Talley, and no Claim having ever been made by the Grandchild, ſhewed the Grandchild was but a Truſtee for the Grandmother, and if this was at all a Truſt, it muſt be always & *ab origine* ſo, that the Child's Father giving the Bond, and the Grandmother's accepting it, tended to make this ſtill more manifeſt. Then there being no Mention made of the Truſt in the Bond, was an Inducement to think, that had it been mentioned therein, the Grandmother would not have accepted it.

The Court thought that what prevailed with the Father to give ſuch Bond, was the Chance of the Grandmother's giving the Annuity to the Grandchild, or at leaſt not giving it from him; and that probably, if the Grandmother had not given it from him, this would have been taken as a conditional Gift to the Grandchild after the Grandmother's Death; and that the Caſe might have been different, if the Grandmother, or Parent had made ſuch a Purchaſe in a Grandchild's or Child's Name, and taken the Profits during the Infancy (*a*) only of the Child, for that would have been no Evidence of a Truſt for the Parent. *Secus* if the Parent had taken the Profits after the Child's coming of Age, and when of Diſcretion to claim his Right.

(*a*) Vide ante *Lamplugh* verſus *Lamplugh*, 111.

It was moreover obſerved that (*b*) Lord *Nottingham* took a Diſtinction where a Parent made a Purchaſe in the Name of a Child already advanced, and thereby as it were emancipated: For that would have been a Truſt for the Father; but if ſuch Child were unadvanced before, it ought (according to him) to be looked upon only as an Advancement of one for whom he was under an Obligation of Duty and Conſcience to provide.

(*b*) Lord *Grey* verſus Lady *Grey*, Hill. 30 Car. 2. & vide the Caſe of *Elliot* verſus *Elliot*, 2 Chan. Caſes 231.

Burnet verſus *Theobald.*

Caſe 177. *Lord Chancellor* Parker.

If after a Decree a Caveat be entred to ſtay the Signing and Inrolling, it ſtays the Signing 28 Days, not only after pronouncing the Decree, but 28 Days from the preſenting it to Lord Chancellor to be inrolled, and Notice given by Lord Chancellor's Secretary to the Clerk of the other Side.

If after a Decree pronounced, either Side enters a Caveat, this ſtops the Signing and Inrolling for twenty-eight Days, being a Lunar Month; but a Decree being ſigned and inrolled after the twenty-eight Days from the Caveat were expired, and within twenty-eight Days after the Decree was preſented to be inrolled, and the Regularity of the Inrolment being referred to the Maſter Mr. *Holford*, he certified the Courſe to be, that where a Caveat is entred, the Party entring it has twenty-eight Days after the Decree preſented. But *Lord Chancellor* thought this an unreaſonable Delay, there being no Rule or Order of Court for that Purpoſe.

On the other Side it was ſaid that the End of entring ſuch Caveat was to give the Party a reaſonable Time to conſider of the Decree, whether he ſhould ſubmit to it, or rehear the Cauſe, which End would not be anſwered, unleſs the Party had a reaſonable Time after the Decree was drawn up and paſſed; and the Allowance of the twenty-eight Days after the Entering of the Caveat, was immaterial, ſince theſe are commonly ſpent after the Hearing the Cauſe, and before the Decree is drawn up and paſſed.

Alſo the *Maſter* certified that the twenty-eight Days upon the Caveat, ſhould commence only from the Time that the Lord Chancellor's Secretary gave Notice to the Clerk of the other Side, of the Decree being preſented in order to be ſigned, which was likewiſe thought by the Court to be ſtrange; *Et adjourn'.*

But afterwards this Matter being mentioned again, and a Certificate of much the greater Number of Clerks in the Office being produced, ſhewing the conſtant Courſe and Practiſe of the Office to be, that the twenty-eight Days ſhould be accounted from the Time of the Decree's being preſented to the Great Seal to be ſigned in Order to it's Inrolment, and Notice thereof given by the Secretary to the Clerk of other Side: *Lord Chancellor* ſaid this ſeemed to him to be the conſtant Practiſe, and the Maſter's Report being ſo, his Lordſhip would not over-rule it on a Motion, but on the Contrary held the Report to be right, and according to the Uſage and Practiſe in that Caſe.

Ex parte *James*.

Caſe 178. *Lord Chancellor* Parker. Creditor by Bond before Day of Payment cannot take out a Commiſſion of Bankruptcy, nor ought any Proceeding to be had upon ſuch Commiſſion.

A. Was bound in a Bond to *B.* payable on *May-Day* then next, *A.* in the mean Time becoming a Bankrupt, *B.* before *May-Day* takes out a Commiſſion of Bankruptcy againſt him, and the Commiſſioners having ſummoned his Wife, would have examined her touching the Time and Manner of *A.*'s becoming a Bankrupt, but ſhe refuſing to make any ſuch Diſcovery, they committed her. And ſome of *A.*'s Creditors who came in under the Commiſſion, and paid their Contribution Money, impriſoned *A.* for the Debt for which they ſought Relief by the Commiſſion; and upon the Petition of *A.* and his Wife diſcloſing theſe Matters, and hearing Counſel on both Sides,

It was reſolved by *Lord Chancellor*, *Firſt*, That if a Creditor by Bond before the Day of Payment ſues out a Commiſſion of Bankruptcy againſt the Obligor in the Bond, it is irregular, and ſuch an Irregularity, for which the Commiſſion ought to be ſuperſeded; for though it be *Debitum in præſenti* (a), yet as it cannot be ſo much as put in Suit, or an Action commenced upon it, much leſs can there be a Commiſſion of Bankruptcy taken out on ſuch a Bond, whereby all the Real and Perſonal Eſtate of the Bankrupt is (as it were) ſeiſed in Execution.

Secondly, That the Wife of the Bankrupt cannot be examined againſt her Huſband touching his Bankruptcy. She by the Common Law cannot be a Witneſs (b) for or againſt her Huſband; and though the former Statute of 21 *Jac.* 1. authorizes the Commiſſioners to "examine the Wife touching any Concealments of the "Goods, Effects or Eſtate of the Bankrupt," yet neither does that, or the (c) late Statute of the laſt Seſſions extend to Examining the Bankrupt's Wife touching his Bankruptcy, or whether he had committed any Act of Bankruptcy, and how or when he became a Bankrupt.

Bankrupt's Wife cannot be examined againſt her Huſband to prove his Bankruptcy; may by Statute touching diſcovering her Huſband's Effects.

And the Court ſaid, that until the late Statute abovementioned concerning Bankrupts, the Commiſſioners could not examine the Bankrupt himſelf touching his Bankruptcy, and that in this Act there is no Clauſe enabling them to examine the Bankrupt's Wife againſt her Huſband. And though the Warrant of Commitment of the Wife was produced, by which it appeared that the Commiſſioners had committed her *as well for refuſing to diſcover the Goods and Effects of the Bankrupt*, as to diſcover the Time and Manner of his Bankruptcy: Yet by *Lord Chancellor*, one of the Reaſons for committing the Wife, being for not diſcovering how and when her Huſband was a Bankrupt, and ſhe being to continue in Priſon till ſhe ſhould make this Diſcovery, the Commitment is illegal, and ſhe ought to be diſ-

Bankrupt himſelf by Stat. 5 *G.* 1. may be examined touching his own Bankruptcy.

If one of the Reaſons for the Commitment be illegal, and the Party to continue in Cuſtody till the Thing ſo illegally required of him be done, the whole Commitment is naught.

(a) *Vide autem* the Statute of 7 *Geo.* 1. *cap.* 31. & 5 *Geo.* 2. and how theſe Statutes have altered the Law in that Point. (b) 1 Inſt. 6. b. 2 Vern. 79. (c) 5 *Geo.* 1. *cap.* 24.

diſcharged; and accordingly it was ordered ſhe ſhould be diſcharged.

Creditors of a Bankrupt, who come into the Commiſſion, ſhall not impriſon the Bankrupt for not paying the Debt.

Thirdly, It was reſolved that ſuch of the Bankrupt's Creditors, as came in under the Commiſſion by which all the Bankrupt's Eſtate both Real and Perſonal (by Means whereof he ſhould pay his Debts) was ſeiſed, ſhould not be allowed to impriſon the Bankrupt for not paying thoſe Debts. Wherefore the Court ſaid they would order the Bankrupt to be diſcharged out of Cuſtody, as to any Action brought by thoſe who had come into the Commiſſion of Bankruptcy, and had ſought Relief thereby. And though it was objected by Mr. *Mead*, that the Bankrupt ought not to be diſcharged until he had perfected his Examination,

The Court held the Contrary; for it did not appear that the Bankrupt was in Contempt or had refuſed to be examined; if he had, yet when the Commiſſion of Bankruptcy was irregularly ſued out, there ought not to be any Proceedings upon it by way of examining the Bankrupt, or otherwiſe.

Caſe 179.

Grantham & al' Commiſſioners and Truſtees of the forfeited Eſtates verſus *Alexander Gordon.* (In Domo Procerum.)

Attainder of Major General *Thomas Gordon*, Laird of *Auchintoule*, will not extend to attaint the Party, if his Name be *Alexander*, though the reſt of the Deſcriptions agree.

BY an Act of Parliament made in the firſt Year of King *George*, for the Attainder of Earl Mariſchal *& al'*, it was enacted (*int' al'*) " That if Major General *Thomas Gordon*, Laird of *Auchintoule*, ſhould not render himſelf before ſuch a Day, he ſhould be attainted of High Treaſon.

Major General *Gordon*'s Chriſtian Name was *Alexander* not *Thomas*, and he did not render himſelf within the Time.

The Commiſſioners of the forfeited Eſtates in *Scotland*, adjudged that the Reſpondent *Alexander Gordon* was not attainted; whereupon the Commiſſioners for forfeited Eſtates in *England* appealed to the Houſe of Lords.

It was inſiſted for the Forfeiture, that here was a full Deſcription without a Chriſtian Name, (*viz.*) Major General *Gordon*, Laird of *Auchintoule*, which was a ſufficient Certainty; for every one muſt know who was meant by it; and if the Deſcription without the Chriſtian Name was ſufficient, then *utile per inutile non vitiatur*.

That as in 1 *Inſt*. 3. *a*. a Grant made to *John* Earl of *Pembroke*, when his Name is *William*, or to *John* Biſhop of *Rocheſter*, when his Name is *William*, is good, becauſe there can be but one of that Dignity, but one Earl of *Pembroke*, and but one Biſhop of *Rocheſter*, (wherefore the Addition of a falſe Chriſtian Name would not hurt it:) ſo in the Principal Caſe there being but one Major General *Gordon*, Laird of *Auchintoule*, this Deſcription could anſwer no Perſon whatſoever but the Reſpondent.

Alſo that there was ſufficient Certainty according to the Courſe of Parliament; and therefore that might be good by way of Impeachment, which would not be ſo in a Proceeding by Indictment, for which Purpoſe Dr. (*a*) *Sacheverel*'s Caſe was cited.

(*a*) State Trials, Vol. 4. 966.

For the Reſpondent it was argued, that there ought to be a legal Certainty not only in Indictments for Capital, but for all Criminal Offences, and much more would the Law require Certainty in the Caſe of an Indictment for an Offence, whereby a Man's Blood was to be corrupted, his Eſtate forfeited, and his Life taken away in the moſt formidable Manner.

That though it might be true (which however was not admitted) that an Attainder would be good by the Deſcription of Major General *Gordon*, Laird of *Auchintoule*, and that there might be ſuch a Man; yet adding a Wrong Chriſtian Name was much worſe than if there had been no Chriſtian Name at all; for there might be ſuch a Man as Major General *Gordon*, Laird of *Auchintoule*, and yet no ſuch Man as Major General *Thomas Gordon*, Laird of *Auchintoule*.

That the Caſe cited from 1 *Inſt.* 3. *a.* might be allowed to be Law, and yet that no ways like the Caſe now under Debate; becauſe in a Grant the Law takes it as ſtrongly as may be againſt the Grantor, *ut Res magis valeat*, it being preſumed that ſome valuable Conſideration was given for the Grant, and it would be very hard, that the Purchaſer, by Reaſon of a Miſtake of his Name, ſhould loſe his Purchaſe; wherefore it is ſufficient to make the Grant good, if it can appear who was intended to take, becauſe the Grant of the Party founded upon the Contract of the Party, ſhall take Effect according to his Intent, and Purchaſes may be good without either Chriſtian or Surname, as the eldeſt Son or youngeſt Son of *J. S.* (1 *Inſt. ubi ſupra*;) but in Caſe of an Indictment the Conſtruction is not to be according to the Intent of the Indictment, but muſt be ſtrictly certain; and if an Indictment is to be ſo, much more muſt an Attainder which binds for ever, both as to

Life and Eſtate; and an Indictment of one by the Deſcription only of the eldeſt or youngeſt Son of *J. S.* would not be good.

That the Names of *Alexander* and *Thomas* were two as different Names as well could be, and therefore it was impoſſible that *Alexander Gordon* could be intended to be *Thomas Gordon.*

That ſuppoſing Major General *Alexander Gordon* were attainted by his *right* Name, and afterwards pardoned by the *wrong* Name of *Thomas Gordon,* this Pardon would not be good, becauſe it could not be intended a Pardon of the ſame Perſon that was attainted. And it would be very hard that ſuch an Attainder as was in the principal Caſe, ſhould, notwithſtanding the Miſtake of the Name, be good *to take away* a Man's Life, and yet that a *Pardon,* by Reaſon of the ſame Miſtake of the Name, ſhould not be good to *ſave* the Man's Life; [which Reaſon had great Weight with the Lords.]

That if this Attainder of *Alexander* by the Name of *Thomas* were to be good, an innocent Man might be executed inſtead of the Guilty; and it would be ſufficient to ſay that *Alexander* was the Man intended, though *Thomas* was the Man attainted. But as Incertainty was the Mother of Confuſion, ſo it was the Happineſs and Excellency of our Law to delight (*a*) in, and eſpecially in criminal Proſecutions to require Certainty.

That if *Alexander Gordon* were outlawed by the Name of *Thomas Gordon,* the Law in that Caſe would allow him no Redreſs by Writ of Error, becauſe he would not be hurt, nor any ways concerned in the Outlawry of one who was ſuppoſed to be another Perſon: And yet where the Law ſaid the Perſon was *not*

hurt

(*a*) Ante 194. in the Caſe of *Mitchell* verſus *Reynolds.*

hurt or any ways concerned, the Attempt now was to *hang* that Man, and to *take away all his Eſtate.*

That the Objection was the ſtronger in the principal Caſe, for that the not rendering himſelf (by the Time preſcribed by the Act) made the Treaſon; and here *Alexander* might well think himſelf not the Perſon intended and required to ſurrender, when the Act required *Thomas* to ſurrender; conſequently it would be hard, that his not doing of that which he had at leaſt very probable Reaſon to think not incumbent upon him to do, ſhould render him guilty of the higheſt Crime known in our Law, High Treaſon.

And as to what was ſaid, that this being an Attainder by Parliament differed from an Outlawry, and that the Courſe of Parliament made it good: It was anſwered that Impeachments in Parliament differed from Indictments, and might be juſtified by the Law and Courſe of Parliament; but that there was no other Method of conſtruing an Act of Parliament (as this was) but according to the Rules of Law.

Laſtly, that if the Reſpondent *Alexander Gordon* thus intended (as it was ſaid) to be attainted by the Name of *Thomas*, had been brought to the King's Bench Bar, that Court would not, nor could have awarded Execution againſt *Alexander Gordon* on the Attainder of *Thomas*, but on *Alexander*'s ſhewing this to the Court, they muſt have diſcharged him.

Upon which the Counſel being withdrawn, the Lords adjourned the Debate till the next Day, in Order to have the Opinion of all the Judges of *England*, when the Lord Chief Juſtice *Pratt* delivered the Opinion of them all, " That this Attainder of " Major General *Thomas Gordon*, Laird of *Auchintoule*,

“ did not attaint the Reſpondent, whoſe Name was *Alex-* “ *ander*; and that if *Alexander Gordon* upon ſuch an “ Attainder had been brought to the King's Bench Bar, “ and had made this Matter appear, that Court could “ not have awarded Execution againſt him.” Upon which the Decree of the Commiſſioners for forfeited Eſtates in *Scotland* was affirmed.

Memorandum, In this Caſe it was admitted by the Counſel on the other Side, that by the late Statute for the Union of the two Kingdoms of *England* and *Scotland*, Treaſons and Proſecutions for Treaſons are the ſame in *Scotland* as here.

In *Scotland* the Trials and Proſecutions for Treaſon are the ſame as in *England*.

I was of Counſel for the Reſpondent, and Mr. *Bootle* for the Appellants, and alſo a *Scotch* Lawyer on each Side *.

---

* The like Determination was made by the Lords in the *December* following, in the Caſe of *Grantham & al'* verſus *Farquharſon*, who was pretended to be attainted by the Name of *Alexander Farquharſon*, whereas his Chriſtian Name was *Patrick*.

DE

Term. Paſchæ,

1720.

Caſe 180.

Lord Chancellor Parker.

Precedents in Chancery 526.

An Agreement made by the Husband before the Marriage, without Writing, within the Statute of Frauds.

Viſcounteſs Montacute verſus *Her Huſband Sir George Maxwell.*

THE Plaintiff brought a Bill againſt the Defendant her Huſband, ſetting forth that the Defendant before her Intermarriage with him did promiſe that ſhe ſhould enjoy all her own Eſtate to her ſeparate Uſe, that he had agreed to execute Writings to that Purpoſe, and had inſtructed Counſel to draw ſuch Writings, and that when they were to be married, the Writings not being perfected, the Defendant deſired this might not delay the Match, in Regard his Friends being there it might ſhame him: But engaged that upon his Honour ſhe ſhould have the ſame Advantage of the Agreement, as if it were in Writing drawn in Form by Counſel and executed; upon which the Marriage took Effect; and afterwards the Plaintiff wrote a Letter to the Defendant her Huſband, putting him in Mind of his Promiſe, to which the Defendant her Huſband wrote her an Anſwer under his Hand, expreſſing that he was always willing ſhe ſhould enjoy her own Fortune as if Sole, and that it ſhould be at her Command.

To this Bill the Defendant pleaded the Statute of Frauds and Perjuries (*a*), by which "all Promiſes in "Conſideration of Marriage, unleſs ſigned in Writing "by the Party, are made void; and averred that he never ſigned any Promiſe or Agreement before Marriage for her enjoying any Part of her Eſtate ſeparately, which he pleaded in Bar of any Relief or Diſcovery.

(*a*) 29 Car. 2. cap. 3.

It was urged againſt the Plea, that this Promiſe was on the Plaintiff's Side executed by her Intermarriage; and therefore like the ſeveral Caſes in which Equity did relieve, and compel a mutual Execution; that the Letter written by the Defendant, though after Marriage, was an Evidence under his Hand of the Agreement before the Marriage, and ſo took it out of the Statute.

On the other Side it was ſaid, that the expreſs Words of the Statute made all ſuch Promiſes in Conſideration of Marriage void, unleſs they were in Writing ſigned by the Parties; and that there was the greateſt Reaſon for it, ſince in no Caſe could there be ſuppoſed ſo many unguarded Expreſſions and Promiſes uſed, as in Addreſſes in order to Marriage, where many Paſſages of Gallantry uſually occur, and it was therefore provided by the Statute, that all Promiſes made in Conſideration of Marriage ſhould be void unleſs ſigned by the Party. That it was very wrong to call *Marriage* the Execution of the Promiſe, when until the Marriage it was not within the Statute; and the Statute makes the Promiſe in Conſideration of Marriage void; therefore to ſay that the Marriage was an Execution which ſhould render the Promiſe Good, was quite fruſtrating the Statute; which the Court took Notice of and approved.

Lord Chancellor : In Caſes of Fraud, Equity ſhould relieve, even againſt the Words of the Statute: As if one Agreement in Writing ſhould be propoſed and drawn, and another fraudulently and ſecretly brought in and executed in Lieu of the former, in this or ſuch like Caſes of Fraud, Equity would relieve; but where there is no Fraud, only a relying upon the Honour, Word or Promiſe of the Defendant, the Statute making thoſe Promiſes void, Equity will not interfere; nor were the Inſtructions given to Counſel for preparing the Writings material, ſince after they were drawn and ingroſſed, the Parties might refuſe to execute them, and as to the Letter, it conſiſts only of General Expreſſions; as "That the Eſtate ſhould be at the Plaintiff's Command "or at her Service;" indeed had it recited or mentioned the former Agreement and promiſed the Performance thereof, it had been material. But as this Caſe is circumſtanced, allow the Plea.

Alſo this Plea being in Bar of a Diſcovery as to all Matters, which if diſcovered and admitted might be barred by the Statute, ſo far may the Statute be pleaded in Bar of ſuch Diſcovery.

Lewis verſus *Chaſe*.

Caſe 181. *Lord Chancellor* Parker. A Creditor petitions againſt the Allowance of a Bankrupt's Certificate, upon which the Bankrupt gives him a Bond for Payment of his whole Debt in Conſideration of withdrawing his Petition; Equity will not relieve againſt this Bond.

THE Plaintiff being a Bankrupt, endeavoured to be diſcharged with the Conſent of four Fifths of his Creditors in Number and Value, upon the late Statute; the Defendant a Creditor preferred his Petition to the Lord Chancellor againſt the Allowance of the Certificate; upon which the Bankrupt, in Conſideration of the Defendant's withdrawing his Petition, gave him a Bond for his whole Debt. Afterwards the Bankrupt's Certificate was allowed, and the Defendant putting the Bond in Suit againſt the Bankrupt, he pleaded the Act of Parliament, and that the Bond was obtained in order to procure his Diſcharge; and on a Verdict for the Plaintiff, the Bankrupt brings this Bill, inſiſting that the Bond was obtained from him under his Neceſſities, and within the Reaſon of that Clauſe in the (*a*) Statute which makes (*a*) 5 Geo. 2. Bonds void for conſenting to the Bankrupt's Diſcharge; and it was repreſented as an unconſcionable Thing for one Creditor to deſire more than his Share of the Bankrupt's Eſtate with the reſt, and that on the other Hand the Bankrupt ought to be favoured, who had given up all to his Creditors.

Cur': Here is an honeſt Creditor, and the Bankrupt if he pays him all, ſtill pays but what in Conſcience he ought. He that comes into Equity to avoid the Payment of a juſt Debt, ought to come with a very clear Caſe if he hopes to ſucceed. The Defendant could not be ſaid to do amiſs in petitioning the Great Seal againſt the Allowance of the Certificate; neither can it now appear to me what ſucceſs that Petition would have been attended with; it may be he had juſt Cauſe to petition, and the Bankrupt no Right to have the Petition diſallowed, and the Plaintiff, if he had a fair Defence, ought to have made Uſe of it againſt the Petition, but in Caſe of treating with the Defendant to withdraw it, the other might inſiſt upon reaſonable Terms to have his juſt Debt.

Suppoſe the preſent Bill were to be diſmiſt, the Conſequence would only be that the Plaintiff muſt pay what he juſtly owes; but were he to be relieved, the Defendant would thereby be put into a worſe Condition than any of the other Creditors; for the Bankrupt's Eſtate being diſtributed, he cannot now have his Proportion thereof, ſo that he muſt loſe his whole Debt; and it is the Plaintiff's Fault to come ſo late; which makes the Caſe ſtill the ſtronger againſt him; nor does the Law make any Diſtinction whether the Bankrupt became ſo by his own extravagant Way of living or by Misfortunes; and therefore he is the leſs to be favoured. It is hard enough to bar Creditors of the full Remedy which the Law gives for the Recovery of Debts; indeed where the Words of the Statute are plain they muſt be ſubmitted to, but then the Bankrupt ought in all ſuch Caſes to bring himſelf within it. And it would not be fair to put the Defendant, who has the Law of his Side, in a worſe Condition than any of the other Creditors whoſe Debts are extinguiſhed by the Statute; therefore diſmiſs the Bill with Coſts.

Caſe 182. *Lord Chancellor* Parker.

Edward Trevor eldeſt Son of Sir John Trevor, late Maſter of the Rolls, & al', } *Plaintiffs;*

John Trevor the ſecond Son, & al', } *Defendants.*

Abridgment of Caſes in Equity 387. One Articles on Marriage to ſettle Lands on himſelf for Life, Remainder to the Heirs of his Body by his intended Wife, with a Covenant to make this Settlement within two Years, or in Default thereof to ſtand ſeiſed to the ſame Uſes; though this be an Eſtate-Tail at Law, yet Equity will turn it into a ſtrict Settlement.

SIR *John Trevor* late Maſter of the Rolls, being ſeiſed in Fee of the Capital Meſſuage called *Brinkynall*, and diverſe Lands in the Counties of *Denbigh* and *Salop*, on his Marriage with *Jane Puleſton*, by Articles dated the 23d of *October* 1669, in Conſideration of the then intended Marriage, did for himſelf and his Heirs covenant with the Truſtees therein named, before the End of two Years, to ſettle and aſſure upon the ſaid Truſtees, as they the ſaid Truſtees ſhould direct and appoint, all the Premiſſes to the ſeveral Uſes in the Articles expreſſed, as alſo in the Settlement and

Conveyance, as ſhould be limited and agreed upon by Sir *John Trevor* and the ſaid Truſtees, and to no other Uſe, (*viz.*) To the Uſe of him the ſaid Sir *John Trevor* for Life without Waſte, Remainder to the Uſe of *Jane* his intended Wife for her Life, Remainder to the Uſe of the Heirs Male of him on her Body to be begotten, and the Heirs Male of ſuch Heirs Male lawfully iſſuing, Remainder to his own Right Heirs.

Sir *John Trevor* by the ſame Articles covenanted with the Truſtees, that the Premiſſes ſhould remain after his Deceaſe to the ſaid *Jane* his intended Wife for her Life, free from all Incumbrances, and in Caſe the Uſes therein were not thereafter well and truly raiſed, according to the true Intent and Meaning of the Articles, that then he and his Heirs ſhould ſtand and be ſeiſed of the Premiſſes, until ſuch Time as a farther Aſſurance ſhould be thereof made to the Uſes of the ſaid Articles.

The Marriage took Effect, and Sir *John* had Iſſue by *Jane*, the Plaintiff *Edward Trevor*, and the Defendants *John*, *Arthur*, *Tudor*, *Anne* afterwards Lady *Middleton*, and *Prudentia Trevor*.

No Settlement was made purſuant to the Articles, nor any Requeſt by the Truſtees; and the Plaintiff *Edward* incurred his Father's Diſpleaſure, having without his Conſent married a Woman of no Fortune.

Sir *John Trevor* and his Wife *Jane* levied a Fine of the Premiſſes, declaring the Uſes thereof to himſelf and his Wife for their Lives, Remainder to the ſecond Son the Defendant *John Trevor* in Tail Male, and ſo to the younger Sons in Tail Male ſucceſſively; and this Settlement was by Conſent of the Plaintiff's Father and Mother delivered to the Defendant *John Trevor*. 1692.

After-

(*a*) May 20, 1717.

Afterwards Sir *John* (*a*) *Trevor* died Inteſtate, leaving a Real Eſtate in *Ireland* of about 900 *l.* a Year, and ſome new purchaſed Eſtates in Fee in *England*, which deſcended to the Plaintiff *Edward Trevor*, and poſſeſſed likewiſe of a very great Perſonal Eſtate, the Plaintiff *Edward*'s Share whereof came to near 10000 *l.*

The Plaintiff *Edward Trevor* brought his Bill to compel the ſecond Son *John Trevor* and the other Brothers and Siſters who claimed under the Fine and Deed of Uſes of Sir *John* and his Wife, to convey the Premiſſes to himſelf in Tail as Heir of Sir *John Trevor* and his Lady.

And the Cauſe coming on to be heard before the Lord Chancellor *Parker*,

For the younger Brother it was inſiſted, that theſe Articles were of an ancient Date, (*viz.*) in 1669 (about fifty Years ſince) and that as a Limitation of an Eſtate to *A.* for Life, Remainder to the Heirs Male of his Body, made an Eſtate-Tail in *A.* ſo in the Execution of Articles in Equity they would follow the Words, which muſt create an Eſtate-Tail in Sir *John Trevor*.

That the Uſe being to Sir *John Trevor without Waſte*, Remainder to the Heirs Male of his Body by the ſaid *Jane*, made no Alteration; it being a conſtant (*b*) Rule, that where an Eſtate is limited to one for Life, with a Remainder (mediate or immediate) to the Heirs Male or Heirs of the Body of the Tenant for Life, theſe were only Words of Limitation.

(*a*) Ante in *Hayter* verſus *Rod*, 371. and *Goodright* verſus *Wright*, 399.

That

That if in any Caſe the Law were otherwiſe, it would be in that of a *Deviſe* of Lands to *A.* for Life without Waſte, Remainder to the Heirs of his Body; yet even in ſuch Caſe, though it were an expreſs Eſtate for Life, and though there were the Words [ſans Waſte] and though the Intent of the Party was allowed to prevail more in a Will than in any other Conveyance, it would notwithſtanding be an Eſtate-Tail; nay even in Caſe of a Deviſe of a *Truſt* to *A.* for Life without Waſte, Remainder to the Heirs Male of his Body, it had been decreed an Eſtate-Tail in *Bale* and *Coleman* (*a*) by Lord *Harcourt*, who reverſed the Decree of Lord *Cowper* in that Caſe.

(*a*) Vide ante 142.

Alſo that the Addition of the Words [the Heirs Male of the Body of Sir *John Trevor* and the Heirs Male of ſuch Heirs Male] was immaterial and but Tautology; for the Deed having limited the Premiſſes to the Heirs Male of the Body of Sir *John* by *Jane,* the following Words did only repeat the ſame Thing over again; and it would have made no Alteration, had thoſe Words been repeated ten Times over, according to 1 *Co.* 104. *Shelley's* Caſe, and that of *Legate* and *Sewell* * in 1706. which was ſent out of this Court to the Judges of the Common Pleas, and was a much ſtronger Caſe.

It was admitted, that if the Limitation had been to Sir *John Trevor* for Life, Remainder to the *Heir* Male of his Body by Dame *Jane* (in the ſingular Number) and to the Heirs Male of the Body of ſuch Heir Male, this had been but an Eſtate for Life in Sir *John Trevor*, by Reaſon the Words [Heir Male] were in the ſingular Number (*b*) and but a Deſcription of the Perſon, having a ſubſequent Limitation annexed to them; but even

(*b*) 1 Co. 66. b. *Archer's* Caſe.

---

* By the Opinion of three of the Judges of *C. B. cont' Tracy.* See their Certificates, *ante* 88.

even in that Caſe it would have been a contingent Remainder, which the Fine afterwards levied by Sir *John Trevor* and his Lady would have barred. But in the principal Caſe, the firſt Limitation being to the Heirs Male of the Body of Sir *John* by *Jane* (in the Plural Number) would have made an Eſtate-Tail, had it been in a Conveyance.

That it was true, latterly in the Execution of Marriage Articles, Decrees had gone according to the Intention of the Parties, as being a Matter wholly executory, and in the Power of Equity to mould and turn as the Parties intended; which yet was a pretty ſtrained Conſtruction; for when I covenant to convey an Eſtate to one for Life, Remainder to the Heirs Male of his Body by his Wife, and to *no other Uſe*, (as is ſaid here;) that Equity ſhould ſay it *ſhall be to other Uſes*, (*viz.*) To the Man for Life, Remainder to Truſtees to preſerve contingent Remainders, Remainder to the firſt, *&c.* Son of the Marriage, ſeemed at Law a Breach of the Covenant; and it would ſound hard, that there ſhould be no other Way of *performing a Covenant in Equity*, but by *breaking it at Law*.

That the Conſtruction of theſe Articles muſt be the ſame as if they had come under the Conſideration of a Court of Equity about the Time of the Date of them; and then there could be no Caſe cited wherein Equity had ſo far taken upon itſelf, as to Decree the Husband but an Eſtate for *Life*, when the Articles ſaid he ſhould have an *Eſtate-Tail*.

However, this Caſe went much farther; for here being no Settlement of the Premiſſes made, or required to be made within the two Years, this was a Covenant to ſtand ſeiſed, by Virtue of which Sir *John Trevor* was actually ſeiſed of an Eſtate-Tail veſted, and theſe

Articles being actually executed, were not to be executed over again in a Court of Equity; no Inſtance could be given, where a legal Eſtate veſted by a Marriage Settlement was afterwards altered and deveſted in Equity.

That ſuppoſe this Settlement had been by way of Leaſe and Releaſe to Sir *John Trevor* for Life without Waſte, Remainder to his Wife for Life without Waſte, Remainder to the Heirs Male of his Body by his Wife, Equity would never have altered or curtailed the Settlement, or turned a veſted Eſtate-Tail into an Eſtate for Life; no Inſtance could be given of that Nature; and if ſo, a Covenant to ſtand ſeiſed was as much a Conveyance, as compleat and more ancient than a Leaſe and Releaſe; for the Bargain and Sale for a Year was but a modern Invention * of putting the Grantee into Poſſeſſion, to enable him to take a Releaſe.

Again, though it might be objected that this Covenant to ſtand ſeiſed was only until a Settlement ſhould be made, yet till then it was a veſted Eſtate-Tail in Sir *John Trevor*; and the future Settlement was to be made only as it ſhould be agreed on betwixt Sir *John* and his Truſtees, which now could never be, Sir *John* being dead.

In the next Place it was urged, that the equitable Circumſtances of the Caſe were to be conſidered.

Here was an eldeſt Son who had provoked his Father by a very improvident Marriage, which was but a juſt Occaſion for the Latter's giving away from him ſome Part of the Eſtate; notwithſtanding which, his Father had ſtill been very kind to him:

---

* Sir *Francis More* is ſaid to have been the firſt Perſon who practiſed this Way, by Chief Juſtice *North* in the Caſe of *Barker* verſus *Keate*, 2 Mod. 252.

Firſt, By leaving to deſcend upon him an Eſtate in Fee in *Ireland* of about 900 *l.* a Year, which with the Timber was worth above 25000 *l.* *Secondly*, By leaving to deſcend upon him diverſe Lands of Value in *England*, purchaſed by the Father after the Making the Settlement, being above 200 *l.* a Year; all which it was in the Power of Sir *John Trevor* to have given from him. *Thirdly*, by leaving a Share of the Perſonal Eſtate to come to him, of near 10000 *l.* Value. So that this was more than an Equivalent for the Eſtate in Queſtion, which the elder Brother could not come at but by the Aid of Equity.

That Sir *John Trevor*'s permitting theſe Lands to deſcend to his eldeſt Son, was giving them to him; the not hindring him of them when in his Power ſo to do, was a Gift of them to him. For this Reaſon it has been decreed, (*a*) where a Man by Marriage-Articles covenanted to ſettle Lands of 100 *l.* *per Annum* on his eldeſt Son, to take Effect after his Death, that the leaving Lands of 100 *l.* a Year to deſcend to ſuch Son, was in Equity a Performance of the Covenant. So likewiſe the Statute of Diſtribution makes (as it were) a (*b*) Will for every Inteſtate, and conſequently this eldeſt Son's Share of the Father's Perſonal Eſtate, which came to him upon his Father's Death, is a Legacy of 10000 *l.* left him by his Father. Wherefore the Eldeſt Son could not ſay he was wronged by that Father who has left to deſcend or come to him an Eſtate of about four Times the Value of the Lands in Diſpute.

(*a*) 2 Vern. 558.

(*b*) 2 Vern. 710. Ante *Bland* verſus *Widmore* 324.

But the Caſe was ſtill ſtronger, if it was conſidered that, when this Settlement was made upon *John Trevor*, he was then a younger Son unprovided for, and had attained to Manhood; that Equity favours ſuch Proviſions, looking upon them as in Nature of a Purchaſe; for which Reaſon, were there a Deviſe of a Copyhold without a Surrender, Equity would ſupply the Want of it for a younger Son, as much as it would in the Caſe of a Purchaſe.

Objected, The Articles are a Lien, a ſpecific Lien upon theſe Lands; and if the eldeſt Son has in Equity a Right to them in Specie, the Father cannot bind that Right by giving him other Lands.

Reſp. The eldeſt Son can have no Right to, or Lien upon theſe Lands, if the Eſtate be an Eſtate-Tail executed by the Articles, and conſequently barrable by the Father, and which the Father upon a juſt Provocation has barred; the Articles are then executed inſtead of executory.

But for Argument ſake, ſuppoſe this were otherwiſe: A Court of Equity is not bound to execute all Articles, but conſiders the Circumſtances of the Caſe; and if Hardſhips would enſue on the Execution of ſuch Articles, Equity, under thoſe Circumſtances, will not decree an Execution.

Articles can in no Caſe be a greater Lien upon Land, than when I covenant to ſell my Land to another. Suppoſe then, I article to ſell my Land to another for Half the Value, this being an unequal Agreement, Equity will not execute it: And in the Principal Caſe, Hardſhips, many Hardſhips would enſue the Execution of the Articles. The Intention of a dead Father would be fruſtrated by a Son who had received from his Father ſo ample an Equivalent; and a younger Son at that Time unprovided for, would be defeated of his intended Proviſion.

Farther, it was an Argument that the only Eſtate intended to be effectually ſecured by theſe Articles was the Mother's Eſtate for Life, (*viz.*) her Jointure, ſince the Covenant of Sir *John Trevor* went only to this, that the Premiſſes ſhould remain to *her* free from Incumbrances, no Covenant extending to the *Heirs Male of the Marriage*.

It was of Weight alſo that the late *Maſter of the Rolls* (who had ſo long preſided in a Court of Equity with great Experience and Reputation) was ſo far from being apprehenſive the Articles hindered him from diſpoſing of theſe Premiſſes, that he recited the very Articles in the Settlement now in Queſtion, and was ſo far from concealing them (which it ſeems had been an Imputation caſt upon him by the other Side) that he recited by this very Settlement his Intention to inrol them in Chancery. *His Honour* was ſo well ſatisfied he had a Power over this Eſtate, as to have ſold Part of it to a Purchaſer who then quietly enjoyed it; but how long he was to do ſo, if the Plaintiff prevailed, might be a Queſtion.

Upon the whole Matter, the Law was for the Defendant *John Trevor* the ſecond Son; the equitable Circumſtances of the Caſe were for him; the Intention of his dead Father was for him; the Opinion too of his Father, who might be juſtly ſaid to have been a great Judge, was alſo for him; and it was hoped the Opinion of the Court would be ſo to.

But *Lord Chancellor* decreed againſt the Defendant *John Trevor* the ſecond Son, on theſe Reaſons:

That Marriage Articles were in their Nature executory, and ought to be conſtrued and moulded in Equity according to the Intention of the Parties.

Now that Intention was plain in this Caſe, and the Conſideration extended to the Heirs Male of the Body of Sir *John* by his Lady, as well as to her in Reſpect of her Jointure.

Beſides, the Agreement was to ſettle the Premiſſes to himſelf for Life *without Impeachment of Waſte*, and to the Heirs Male of his Body by *Jane*, and to the Heirs Male of ſuch Heirs Male; ſo that it could not be doubted but that the Intention was, Sir *John* ſhould have an Eſtate for Life only; and the Privilege of Waſte would be to no Purpoſe, if he was to have an Eſtate-Tail, which would of Courſe have made him diſpuniſhable for Waſte.

That if within the two Years the Wife's Truſtees had called for a Settlement, or had brought a Bill to compel a Performance of the Marriage Articles, there could be no Queſtion, but that according to the ſeveral Precedents which have been in this Court, Equity would have directed the Settlement to have been made to Sir *John* for Life, Remainder to his firſt Son, *&c.* and to ſay Precedents have not gone ſo high and ſo far backwards as the Date of theſe Articles, ſeemed immaterial; for what is Reaſon, Equity, and good Conſcience *now*, always *was*, and always *would* be ſo.

And as, if the Truſtees had applied within the two Years, in order to have a Settlement made, it would then have been directed to be made to the firſt, *&c.* Son of the Marriage; ſurely their Default or Neglect ſhould

Vide 2 Vol. 438.

ſhould never hurt the Iſſue of the Marriage; it were abſurd to ſay it ſhould.

That it would be a ſtrange and vain Conſtruction of the Articles, if Sir *John* ſhould have ſuch an Eſtate by them, the Limitations of which the very next Day he might by a Fine deſtroy; and making ſuch a Settlement upon the firſt, *&c.* Son, would not be a Breach of the Covenant, becauſe it would be a Settlement according to the Intention of it; and a Settlement according to the Intention of the Covenant is not a *Breach*, but a *Performance* of it.

That by the whole Scope of theſe Articles, they were never deſigned for a Settlement, but only a bare Agreement, how, and to what Uſes the Premiſſes in Queſtion ſhould be ſettled. For firſt, Sir *John Trevor* covenanted, within two Years, to ſettle and aſſure the Premiſſes to Truſtees and their Heirs, as they or their Heirs or their Counſel ſhould appoint, to the ſeveral Limitations and Uſes in the Articles mentioned, and alſo in the ſaid Settlement, as ſhould be agreed upon by Sir *John Trevor* and the Truſtees.

That the Covenant to ſtand ſeiſed, in the latter End of the Articles, could not be taken as a final Settlement from the Words of it; and the precedent Part of them were proviſional only, (*viz.*) to ſtand till a Settlement ſhould be made, effectually to anſwer the Intention of the Parties.

That the Articles gave a Right to the eldeſt Son to claim theſe Lands in Specie, which if he inſiſted upon, he muſt have; and if other Lands had been given to him in Satisfaction, ſtill he might have claimed theſe Lands, and Equity could not have hindered him. That he did not claim the *Iriſh*, or after purchaſed Eſtate, by the Gift of the *Father*, but rather of *Providence*; for it was highly improbable that the Father, who had given his Son ſuch a Character in thoſe hard and ſevere Expreſſions by his Deed of Settlement, ſhould entertain any favourable Intentions towards him. And that the eldeſt Son being a Purchaſer under the Marriage-Articles, muſt prevail againſt a voluntary Conveyance made by the Father to his younger Son.

That as to ſuch Part of the Premiſſes as was ſold by Sir *John* for a good Conſideration, that was but a ſmall Part, and the Purchaſer would ſtill enjoy it, as he had no Notice of the Articles at the Time of his Purchaſe.

Then his Lordſhip cited the Decree in the Caſe of *Bale* verſus *Coleman*, where Lord *Harcourt* made a Diſtinction betwixt a Deviſe of a Truſt of Land to *A.* for Life, with a Power to make Leaſes, *&c.* Remainder to the Heirs Male of his Body, holding this to be an Eſtate-Tail; but that in Articles on a Marriage to ſettle Lands to *A.* for Life, *&c.* Remainder to the Heirs Male of his Body by the Wife, the Articles being executory, and but as Minutes, the Settlement ſhould be according to the Intention, and conſequently to the firſt Son, *&c.*

Laſtly, his Lordſhip ſaid, this appeared to have been the Opinion of Sir *John Trevor* himſelf, and ſhewed a Decree made by him to the ſame Effect upon Marriage-Articles.

That if this Conſtruction were not made upon Marriage-Articles, it would give Way to Fraud and Over-reaching, and to the defeating of the manifeſt Intentions of the Parties in Settlements, in which the Iſſue of the Marriage are conſidered as Purchaſers.

Wherefore his Lordſhip decreed that the ſecond Son *John Trevor*, and his younger Brothers and Siſters ſhould join in a Fine to the eldeſt Son, to hold to him in Tail, with Remainders to the other Sons in Tail ſucceſſively, according to the Marriage-Articles.

From this Decree an Appeal was brought *in Domo Procerum*, where the Matter was greatly debated by *Lord Chancellor* and Lord *Nottingham* for the Decree, and Lords *Trevor* and *Harcourt* againſt it; but at length the Decree was affirmed without any Diviſion.

I was of Counſel for *John Trevor* the ſecond Son, both in the Court of Chancery, and on the Appeal.

Caſe 183.
At the Rolls.

Thomas Blunden & Heſter ux' ejus, } *Quer'.*

Frances Barker Adminiſtr' cum Teſtament' annex' Johannis Hebbert defunct' & al', } *Defendentes.*

On a Freeman's Widow's Cuſtomary Part being barred by Compoſition, who ſhall have the Benefit of it; whether the Huſband or Children. Alſo whether a Child's Orphanage Part be barrable by Releaſe or Covenant, for a valuable Conſideration.

MR. *Hebbert* the Upholder, a Freeman of *London*, having Iſſue by his firſt Wife one Daughter, the Defendant Mrs. *Barker*, married to his ſecond Wife the Defendant *Heſter*, and *Feb.* 16, 1684. articled before Marriage to ſettle Lands upon her, and leave her 400*l.* in Money. The Wife before the Marriage bound herſelf

2

ſelf to a Truſtee in a Bond of 3000 *l.* Penalty (reciting the Articles) upon Condition the Bond to be void, if ſhe ſurviving the ſaid *John Hebbert* her then intended Huſband, and on the Receipt of the 400 *l.* ſhould releaſe to his Heirs, Executors or Adminiſtrators, all her Right to his Eſtate real or perſonal, by Virtue of the Cuſtom of *London*.

Mr. *Hebbert* had Iſſue by his ſecond Wife one Daughter, married to the Plaintiff *Blunden*. And after this, advancing his eldeſt Daughter in Marriage, by the Marriage Writings 4000 *l.* in Money was declared to be towards her Portion; and ſome Freehold, together with ſome Leaſehold Eſtates were ſettled upon Mr. *Hebbert* for Life, Remainder to Mr. *Barker* the Huſband, his Heirs, Executors and Adminiſtrators, and this Marriage Writing (among others) was ſigned and ſealed by Mr. *Hebbert* himſelf, who being indebted to his Daughter *Barker* for Monies and Rents received by him during her Infancy (and which had become due from Eſtates given her by her Aunt and other Relations,) Mrs. *Barker*, before her Marriage, executed a Releaſe to her Father of all Rights, Claims and Demands, which ſhe had or might have by the Cuſtom of the City of *London*, ſaving to herſelf whatſoever her Father ſhould voluntarily give her. Sometime after Mr. *Hebbert* made his Will, whereby taking Notice that his ſecond Daughter had married againſt his Conſent, he gave a conſiderable Eſtate to his Wife, and about the Value of 1000 *l.* in Land and Money to his ſaid ſecond Daughter, and after ſeveral Legacies, bequeathed the Surplus to his Daughter *Barker*, and died.

June 19. 1706.

March 6. 1715.

The Plaintiffs *Blunden* and his Wife brought their Bill for an Account of the Perſonal Eſtate of Mr. *Hebbert*, inſiſting, *Firſt*, That the Freeman's Wife having given a Bond in 3000 *l.* Penalty, to releaſe her Right by the

Cuſtom to the Heirs, Executors and Adminiſtrators of her intended Huſband *Hebbert*, this had extinguiſhed her Right by the Cuſtom, ſhe was thereby compounded with, and to be taken as dead; conſequently that the Children of the Freeman were to have one Half of the Perſonal Eſtate, and the remaining Half to be the Teſtamentary Part.

Secondly, That Mrs. *Barker* ought to be barred from taking any Part by the Cuſtom, and this as well in Reſpect of the Releaſe which ſhe had given to her Father, of all Right which ſhe might have to his Perſonal Eſtate by the Cuſtom; as alſo for that it did not appear, what was the Value and Certainty of the Portion which Mr. *Hebbert* had given her, both in Regard to the Uncertainty of the Leaſes, and likewiſe to the Uncertainty of what was due from Mr. *Hebbert* to Mrs. *Barker*, and how much of what was given on Mrs. *Barker*'s Marriage ſhould be applied towards Payment of the Debt due to her from her Father; from all which it was inferred that the Plaintiff Mrs. *Blunden* was alone intitled to a Moiety of the whole Perſonal Eſtate of the Teſtator, (*viz.*) all the Orphanage Part.

Upon the Hearing of this Cauſe before the *Maſter of the Rolls*, his Honour took it, and ſo decreed, that the Releaſe given by Mrs. *Barker*, the eldeſt Daughter, of her Right to her Father's Perſonal Eſtate by the Cuſtom, though it might be void in Strictneſs as a Releaſe; yet being made for a valuable Conſideration, was a good (*a*) Agreement that ſhe the ſaid Mrs. *Barker* would not claim or intermeddle therewith, and ſhould bind her in Equity. Alſo that the Value of the Leaſehold Premiſſes being uncertain, and the *Quantum* of the Debts which Mr. *Hebbert* owed to his Daughter being likewiſe uncertain, and it not appearing how much of the Portion of Mrs. *Barker* ſhould be applied towards

(*a*) Vide 2 Vol. 526. *Cleaver* ver. *Spurling*.

wards Payment of the Debt due to her from her Father, this was a double Incertainty, and therefore not within the Cuſtom; conſequently that Mrs. *Barker* was barred from claiming any of the Orphanage Part.

But there remaining ſome Doubt with the Court how the Widow's Third of the Perſonal Eſtate, on her being compounded with, ſhould be diſpoſed of by the Cuſtom of *London*, the Parties were ordered to attend the Lord Mayor and Aldermen, who were deſired to certify the Cuſtom of the City by their Recorder to the Court on this Point, (*viz.*) "Where the Widow of a "Freeman is compounded with or barred before Marriage "from claiming her Cuſtomary Part of her Huſband's E-"ſtate, and ſuch Freeman dies leaving one or more Child "or Children, is a Moiety, or only a Third of ſuch Free-"man's Perſonal Eſtate, the Orphanage Part belonging "to ſuch Child or Children? And all other proper Di-"rections were reſerved until the Account of the Perſonal "Eſtate ſhould be reported, and the Cuſtom certified."

From this Decree there was an (*a*) Appeal to the Lord Chancellor *Parker*, before whom it was inſiſted, in Support of the Decree, that Mrs. *Barker*'s Releaſe of all Demands, Rights or Claims which ſhe had or might have by the Cuſtom of the City of *London*, was a Diſcharge and Releaſe of her Orphanage Part; that by the ſame Reaſon a Freeman's *Wife* before Marriage might releaſe her Cuſtomary Part, ſo alſo might a *Child* releaſe his Orphanage; nay, that the Wife before her Marriage had not ſo much as an Inchoation of Right: Whereas the Child of a Freeman had an inchoate Right, not perfected (it was true) until his Father's Death in his Life-Time; that there could be no Danger from the Poſſibility of the Father's gaining by his Authority, without a Conſideration, or by any indirect Methods, a Releaſe of the Orphanage Part from his

(*a*) Mich. Term 1720.

Child, ſince whenever that Caſe happened, Equity would interpoſe and ſet aſide ſuch Releaſe; that if it were void at Law, in Regard no Right to the Orphanage Part was veſted in the Child at the Time of the making it; yet being for a valuable Conſideration, it would operate in Equity as an Agreement to quit and waive his Orphanage Part afterwards; and that the Releaſe in the principal Caſe did import ſuch an Agreement by the Daughter to waive her Orphanage Part, as would bind her in Equity.

On the other Side it was ſaid to have been admitted that at Law the Child's Right to the Orphanage Part was not releaſeable in the Father's Life-Time, becauſe the Child neither had nor poſſibly ever might have any Right thereto, any *Jus in re,* or *ad rem*; that many Things might happen, which would prevent the Child's ever having this Right: For Inſtance, he might die in the Father's Life-Time, the Father might leave no Perſonal Eſtate, or might before his Death be disfranchiſed; and if the Child had no Right, he could releaſe none. It was compared in Point of Reaſon to the Caſe in *Lit. ſect.* 446. Father and Son, the Father was diſſeiſed, the Son in the Life of the Father releaſed to the Diſſeiſor all the Right which he had or *might have*; this was held void, becauſe at that Time the Son had no Right; and as in that Caſe the Son might have died in the Father's Life-Time, ſo might the Daughter in the Principal one; and as there the Father might have aliened the Land, ſo here might he have diſpoſed of his Perſonal Eſtate, by inveſting it in Land; that in *Vernon*'s Caſe (4 *Co.* 1. *b.*) it is ſaid that at Common Law, if a Woman before Marriage accepted of a Jointure in Bar and Satisfaction of her Dower, yet this would not bar her; and one of the Reaſons given in the Book is, " becauſe at that Time the Woman having no

" Right

" Right to Dower, could not releaſe what ſhe had then " no Right to."

Lord Chancellor: This Releaſe is clearly void at Law, and for the Reaſon given at the Bar, becauſe at the Time when it was made, the Perſon releaſing had no Right, nor poſſibly ever might have any to the Orphanage Part.

Whereupon it was inſiſted to be unreaſonable, that if the Releaſe in the Principal Caſe was void at Law, it ſhould yet import an Agreement in Equity, which being made on a good Conſideration, might be carried into Execution by this Court; for that by the ſame Reaſon every Agreement that was void at Law, might, from ſome Circumſtances attending it, be pretended ſuch a one as Equity would carry into Execution; that the Covenanting of the *Wife* before Marriage to claim nothing of the Cuſtomary Part was warranted by the Cuſtom, which called it a Compoſition for ſuch Part; but that there could be no ſuch Cuſtom ſhewn to warrant the *Child*'s releaſing the Orphanage Part, neither was it within the ſame Reaſon. The Child was not *ſui juris*; the Awe he was preſumed to have of his Parent, the Duty he owed him, the total Dependance he had upon him for all the Conveniencies of Life, would not ſuffer him to be a Free Agent in this Caſe, would not permit him to deny giving a Releaſe to his Father, though upon the advancing to him a Portion, much leſs than the Cuſtomary Share would come to.

Lord Chancellor: I do not ſee the Argument from the Father's Power over the Child to be of any Weight; for if it ſhould ever appear that this Power has been abuſed

On a Child's releaſing to his Father his Orphanage Part, if the Releaſe be gained by Threats, or unduly, the ſame will be ſet aſide in Equity.

abuſed, a Court of Equity would certainly ſet aſide the Releaſe thus indirectly gained.

But then it was urged, that if a Portion was to be given by a Freeman with his Daughter in Marriage, and this Portion ſhould be mentioned in the Marriage Settlement, and accepted by the Daughter and her intended Huſband as in full of her Orphanage Part, even this, however expreſs, would not yet be conſtrued any Bar to it, nor did it * ſeem ever to have been ſo taken; for if it had, it muſt have been commonly practiſed, and thereby have rendered the Orphanage Cuſtom eaſy to be eluded, and of little Force. Though admitting (for Argument ſake) that ſuch Releaſe would amount to an Agreement in Equity; yet in the principal Caſe the Releaſe was with an expreſs *Saving and Exception* of what thereafter her Father the Freeman ſhould *voluntarily give her*; ſo that it was Part of the very Agreement by which ſhe did releaſe her cuſtomary Share, that ſtill ſhe ſhould have what her Father might think proper to give her, and it was reaſonable and equitable that the Daughter, ſo far as to ſecure her Father's Gifts or Bequeſts by his Will, ſhould inſiſt upon her Right by the Cuſtom, it being upon theſe Terms that ſhe ſubmitted to bar herſelf of the Benefit thereof; and if Equity would enforce the Agreement in any Part, it would do ſo throughout.

Lord Chancellor: This Saving is an Exception out of the Agreement, and makes it as Part thereof, that the Child ſhould ſtill be capable of taking what her Father ſhould be pleaſed to give her; and as it is made by the Daughter with the Father, ſo it ſeems plainly to have been in his Power to relax or releaſe it; it is abſurd to ſay,

---

* Neverthéleſs it was ſo determined in the Caſe of *Medcalf* verſus *Ives* and *Johnſon*, 18 *June* 1737.

ſay, that when an Agreement is made between two Perſons, theſe joining cannot diſpenſe with it. The Agreement was made only for the Liberty and Eaſe of the Father, that the Daughter, *againſt his Will*, might not claim any farther Part of his Eſtate; but ſuppoſing him inclined to give her a farther Part, it would be inverting the Intention of the Agreement, and making thoſe Words which were deſigned to give him a more compleat Power over the Eſtate, to reſtrain him from diſpoſing of it in ſuch Manner as he ſhould judge proper. Wherefore by Virtue of this Saving, the Father might diſpenſe with the Daughter's Covenant; it is no more than a Covenantee's releaſing his Covenant, and the Father's Gifts to his Daughter by Will are a Demonſtration of his Intention to diſpenſe with it.

It has been objected, that the Daughter is hindred from claiming any Orphanage Part, becauſe the Certainty of the Portion does not appear under her Father's Hand.

But in Reality it does appear under the Father's Hand in the Settlement, what her Portion was: It was 4000 *l.* in Money and ſome Leaſes, and there is no Neceſſity that the Value of theſe Leaſes ſhould appear, provided the Thing itſelf be ſufficiently evident; this is the Rule in ſuch Caſes: And it is the faireſt Method imaginable to mention the Thing itſelf that was the Advancement in the Deed. *Id certum eſt quod certum reddi poteſt.*

Object. At this Rate the greateſt Incertainty may be rendered certain, as the moſt perplext and intricate Account may, in the Work of many Years, be ſtated and ſettled; whereas the City muſt have intended by their Cuſtom, that Things ſhould be ſo plain as to be ſeen eaſily and at the firſt View.

Leaſes given to a Child by a Freeman to be brought into Hotchpot and valued.

Reſp. But why cannot theſe Leaſes be valued as well as thoſe of which the Reſidue of the Freeman's Eſtate is ſuppoſed to conſiſt? And what can be fairer than the Offer made, that the other Side ſhould have the Leaſes themſelves given up and brought into Hotchpot? By the ſame Reaſon that theſe Leaſes are wholly uncertain in their Value, ſo muſt 1000*l.* *South-Sea*, or *Eaſt-India* Stock be; and then, if I being a Freeman give 1000*l.* in Money with my Daughter to advance her in Marriage, this will not bar her of her Orphanage Part: But if I give my Daughter half ſo much, (*viz.*) 500*l.* and a Leaſe worth but 50*l.* more, or a Jewel, this will be a good Bar to her from claiming any Orphanage Part. Indeed it is unreaſonable to ſay that the Father ought to put the Value of the Leaſe in the Settlement or Will; for if ſuch Value were to be concluſive, it would then be in the Father's (*a*) Power to make the moſt partial Diviſion of the Orphanage Part among his Children imaginable, by over-valuing what he gives to one Child, and under-valuing what he gives to another.

(*a*) Vide 2 Vol. *Cleaver* verſus *Spurling*, 576.

Object. It is no Hardſhip upon the Children, that the Father may give what he pleaſes out of the Orphanage Part, as little to one Child, and as much as he thinks fit to another; becauſe if the Father gives ever ſo little an Advancement, yet if he will withdraw his Hand, and not ſign the Writing by which the *Quantum* of the Child's Portion may appear, the Child ſhall come in, upon bringing what he has received, into Hotchpot.

Reſp. It is not neceſſary that the *Quantum* of the Portion ſhould appear under the Father's Hand; ſince according to the Caſe of (*b*) *Dean* and Lord *De-la-Ware*, if the Certainty of the Portion with which the Child has been advanced, appears in the Freeman's Books of Account, though written by the

(*b*) 2 Vern. 628.

* *Freeman's Book-keeper or his Servant*, it is as ſufficient as if written by the *Freeman himſelf*, and ſuch Advancement may be brought into Hotchpot; now if it be ſufficient that the Certainty of the Sum ſhould appear under the Freeman's Book-keeper or Servant's Hand, then, as the Freeman muſt be ſuppoſed a Tradeſman, it muſt alſo be preſumed that he keeps Books of Account of all conſiderable Sums expended by him; and therefore if the Freeman gives any Portion with his Daughter, that the Sum and *Quantum* thereof will appear in ſome of his Books of Account.

Object. But the Freeman may inveſt all his Perſonal Eſtate in Land, and by that Means evade the Cuſtom.

Reſp. This cannot be well ſuppoſed of Freemen who are preſumed to be Traders, and conſequently to keep a Stock wherewith to manage their Trade, which Stock is Perſonal Eſtate.

Object. In the principal Caſe there is not only Incertainty in the Value of the Leaſes which are ſettled; but alſo in the *Quantum* of the Portion that ſhall be applied towards ſatisfying the Debt the Freeman owed to his Daughter.

---

* *Quær.* If this is warranted by the Certificate in that Caſe, which was as follows: *Dean & ux'* verſus *Domin' De-la-Ware*, *May* 9. 1710. "In
"Purſuance of an Order of the 16th of *December* then laſt, it is cer-
"tified, that if a Freeman of the City dies leaving a Wife and one
"Daughter married in his Life-Time, and it appears by the Books of
"ſuch Freeman, that he had paid ſeveral Sums of Money in Part of
"ſuch Daughter's Portion unto her Huſband, and afterwards ſeveral other
"Sums, which ought to be taken as paid on Account of the Portion,
"but not expreſly entered in ſuch Freeman's Books as paid in Part of Ad-
"vancement, or in Part of the Portion (*all which Entries are of the*
"*Teſtator's own Hand Writing*) and ſuch Sums taken altogether do not
"amount to a Third of ſuch Freeman's Eſtate, put together with what
"he left at his Death; ſuch Daughter ought not to be taken as fully
"advanced, but in Part advanced only; and in ſuch Caſe by the Cuſtom
"of the City, ſuch Child and her Huſband are to have a Third of what
"the Teſtator left at his Death, without Regard of what was received
"in the Father's Life-Time, and without putting what had been ſo
"received to the Eſtate left at his Death.

Reſp. The Releaſe made by the Daughter to her Father *Hebbert* extinguiſhed that Debt; but if not, Equity, which always marſhals the Application of Aſſets in ſuch a Method, as that all the Creditors may be paid, either out of the Real or Perſonal Eſtate, will in the preſent Caſe marſhal the Application in this Manner, (*viz.*) that the Lands ſettled by Mr. *Hebbert* ſhall go in Satisfaction of the Money which he owed to his Daughter.

In the laſt Place it was ſtrongly contended, that the Court ſhould not ſend it to the *Lord Mayor and Aldermen* to certify, Whether, when the Widow was compounded with, the Huſband's Teſtamentary Part, and the Childrens Orphanage Part ſhould go each in Moieties, in the ſame Manner as if the Wife were dead? In Regard this was ſaid to have been already certified by the City, in the Caſe of (*a*) *Clare* and *Achmooty*, where the Children being all fully advanced in the Father's Life-Time, it was held, that it ſhould be as if there were no Children, and ſo the Wife to have one Moiety, and the other be the Teſtamentary Part; that Agreeable hereto it had alſo been decreed, in the Caſe of (*b*) *Rawlinſon* verſus *Rawlinſon*; wherefore it would be ſetting this Matter at large again, to ſend it a ſecond Time to be certified by the Court of Aldermen.

(*a*) May 24. 1709.

(*b*) July 8. 1714.

But the other Side denied * that this Cuſtom had ever been as yet ſo certified, and inſiſted that the Reaſon of the

2

---

* *Note*; in the Caſe of *Green* verſus *Green*, which was heard at the Rolls, *Hill.* 1718. Mr. *Vernon* obſerved that on this Point Precedents had been both Ways; though the moſt ſolemn ones were againſt the Children's having the Benefit of the Compoſition made with the Wife; to which the Court inclined, without then determining it: But afterwards in the Caſe of *Puſey* verſus Sir *Edward Desboverie*, heard *July* 1734. Lord Chancellor *Talbot* taking Notice of the contrary Determinations made by the Court in this Point, ſaid it had of late been ſettled, that where the Wife was compounded withal, it ſhould be taken as

the Thing was entirely againſt it; for what could be more abſurd than to ſuppoſe a Wife dead when ſhe was living? and yet at this Rate, if the Husband ſhould have compounded with his Wife and die inteſtate, one and the ſame Woman, as to her Claim of the Cuſtomary Part, muſt be taken as dead, with regard to her diſtributory ſhare, looked upon as living. Surely it was much more reaſonable that he who was the Purchaſer of the Wife's Cuſtomary Part, ſhould himſelf have the entire Benefit thereof; that a Man ſhould reap the Advantage of his own Purchaſe, and thereby amplify the Power which he before had over his own Eſtate. Beſides, in this Caſe, the Bond of the Wife before her Intermarriage with her Husband, being to releaſe to his *Executors*, was a farther Argument that the Executors were to have the Benefit of it, and that it ſhould not be abſorbed and extinct; and ſuppoſe the Covenant had been to aſſign her Cuſtomary Part in ſuch Manner as the Husband ſhould direct, it would not in ſuch Caſe have been extinct, but muſt have been aſſigned accordingly; or if it had happened that the 400 *l.* had not been paid to the Freeman's Wife, would ſhe not then have been at Liberty to have taken Advantage of the Cuſtom; at leaſt ſo far as to have made up her 400 *l.*?

Afterwards, (*viz.*) *November* 23. 1720. the following Order was made.

“ Upon reading the Releaſe from the Defendant
“ *Frances Barker*, dated the 19th of *June* 1706. the
“ Will of the ſaid *John Hebbert*, dated the 6th of *March*
“ 1715. the Articles dated the 16th of *February* 1684.
“ and a Bond of the ſame Date,

---

as if there was no Wife, and conſequently that the Husband ſhould have one Moiety and the Children the other. The like was held by the Lord *Hardwicke*, in the Caſes of *Medcalfe* verſus *Ives*, and *Morris* verſus *Burrow*, heard *June* 18. and *February* 3. 1737.

" His Lordſhip declared, he took this to be an abſolute Agreement, that the Defendant *Heſter* ſhould perform the Condition of the ſaid Bond, which was, that after her Husband's Death, ſhe ſhould releaſe to his Executors, and that the Agreement was not that her third Part ſhould be abſorbed for the Benefit of her Children, but ſhould go to his Executors for the Benefit of his Will; that his Lordſhip would look into Precedents, and ſee whether they come up to the preſent Caſe, and alſo whether the Cuſtom of the City of *London* had been certified as to the Queſtion, whether when the Widow of a Freeman is compounded with or barred before Marriage from claiming her Cuſtomary Part of her Husband's Eſtate, and ſuch Freeman dies leaving ſuch Widow living, and alſo one or more Child or Children, is a Moiety, or Third of ſuch Freeman's perſonal Eſtate to be the Orphanage Part? And in Caſe the Cuſtom had already been certified in that Point, his Lordſhip would not ſend it to the City again to be certified.

" And as touching the ſaid Orphanage Part, his Lordſhip declared that the Teſtator had a Power to releaſe the Agreement made with the Defendant *Frances Barker* before her Marriage, and that he had releaſed the ſame by his Will, by giving her the Remainder of his Real and Perſonal Eſtate; that by the Words of the Releaſe executed by the ſaid Defendant *Frances Barker*, ſhe was not to be barred of what more her Father would give her by his Will; and the Teſtator having thereby given her the Remainder of his Perſonal Eſtate, his Lordſhip was of Opinion, that one Third of the Perſonal Eſtate (in Caſe the Defendant *Heſter Hebbert* ſhould be barred thereof) would not fall into, be abſorbed, or extinguiſhed in the Orphanage Part, but would fall into and belong to the Teſtamentary Part;

“ and the Plaintiff *Heſter* would be intitled to no more
“ than a Moiety of one Third of her Father's Perſonal
“ Eſtate, the Defendant *Frances Barker* bringing the
“ Leaſehold Houſes and the 4000 *l.* given her upon her
“ Marriage, into Hotchpot: His Lordſhip farther de-
“ claring, that her Advancement was certain, being the
“ ſaid Leaſehold Houſes and the ſaid 4000 *l.* and that
“ by the Cuſtom, not the Value of the Advancement is
“ to appear with Certainty, but the Thing advanced; and
“ that the Freehold Eſtate ſettled then upon her ought
“ not to be brought into Hotchpot, the Cuſtom of the
“ City of *London* not having any Power over (*a*) Lands
“ of Inheritance; and in Caſe, upon looking into Pre-
“ cedents, his Lordſhip ſhould not find that the Queſtion
“ (Whether when the Widow of a Freeman is com-
“ pounded with or barred before Marriage from claim-
“ ing a Cuſtomary Part of her Husband's Eſtate, and
“ ſuch Freeman dies leaving one or more Child or Chil-
“ dren, the Orphanage Part of ſuch Freeman's Perſonal
“ Eſtate is a Moiety, or only a Third) hath been fully
“ certified, then at the ſame Time his Lordſhip would,
“ if he ſhould ſee Cauſe, ſend it to the Lord Mayor and
“ Court of Aldermen, for them by their Recorder to
“ certify the Cuſtom in that Particular. Alſo that his
“ Lordſhip would, if he ſhould find Cauſe, likewiſe ſend
“ it to that Court to certify the Cuſtom of the City of
“ *London*, as to the Father's Power to compound or
“ make an Agreement with the Daughter before her
“ Marriage, touching her Cuſtomary Share of his Per-
“ ſonal Eſtate; and after his Lordſhip ſhould have been
“ attended with Precedents, or ſhould have the Cuſtom
“ of the City of *London* certified in the Points afore-
“ ſaid, (in Caſe there ſhould be Occaſion) ſuch farther
“ Order ſhould be made as ſhould be juſt *.”

(*a*) Vide ante 531. *Babington* verſus *Greenwood.*

---

* At length the Parties came to an Agreement, ſo that theſe Points were never certified.

Anonymus.

Caſe 184.

Lord Chancellor Parker.

Anonymus.

(*Cauſe by Conſent.*)

10,000 *l.* Truſt Money being agreed to be laid out in Land, and ſettled in the common Form of Marriage Settlements, is employed in buying *South-Sea* Stock, and improved to 30,000 *l.* As the Truſt would have ſuffered by the Fall; ſo ſhall it have the Benefit of the Riſe of the Stock; but the Husband wanting 5,000 *l.* of the 30,000 *l.* the Court decreed that 15,000 *l.* ſhould be taken out; a Third of which (*viz.*) 5,000 *l.* ſhould go to the Husband, as a Recompence for his Eſtate for Life; and that 10,000 *l.* ſhould be laid out in Land to be ſettled on the firſt Son of the Marriage in Tail in Poſſeſſion; but to prevent ſuch Son's ſuffering a Recovery, the Premiſſes were directed to be ſettled on the Father for Life, who was to let the ſame to the Son for ninety-nine Years, if the Father ſo long lived.

TEN Thouſand Pound being given in Marriage by the Father of the Husband and the Father of the Wife, was agreed to be inveſted in a Purchaſe and ſettled on the Husband for Life, Remainder to the Wife for Life as to Part (being 300 *l. per Annum,*) Remainder as to the whole to the firſt, *&c.* Son in Tail Male, Remainder to the Husband in Fee, and in the mean Time to be placed out on Securities, the Intereſt to go as the Profits of the Land when purchaſed.

This 10,000 *l.* was by Conſent of the Parents and Truſtees laid out in the Purchaſe of *South-Sea* Stock, and by the late Riſe of that Stock improved to above 30,000 *l.* and it being of a fluctuating Nature as to the Value, the Husband and Wife, who had two Sons, brought their Bill againſt the Truſtees, and the Father of the Husband, and Father of the Wife, and the Infant Children, praying that the Stock might be ſold, the Money produced by the Sale laid out in Land and ſettled, and that in Regard of the great Increaſe, the Husband might have 6,000 *l.* of the Money to buy himſelf a Place.

All the Defendants by their Anſwer ſaid, they thought it for the Benefit of the Truſt that the *South-Sea* Stock ſhould be ſold, and the ſeveral Fathers of the Plaintiffs did not oppoſe the Husband's having 6000 *l.* ſince all that was agreed or expected to be laid out in a Purchaſe, was but 10,000 *l.* and therefore ſubmitted that Matter to the Court.

This was firſt heard before the *Maſter of the Rolls*, and afterwards by the *Lord Chancellor*, who were both of Opinion, that as, if the Stock had fallen, the Truſt muſt have ſuffered, ſo it's accidental Riſe or Improvement muſt be for the Benefit of the Truſt; and therefore that the Infant Children had a Right to the whole Capital after the Husband's Death, the Conſequence of which was, that he ought not to be permitted to have any of the Capital.

But then it was ſaid, that the Husband's Eſtate for Life was one Third in Value, if compared to the Children's Reverſion, which made up the remaining two Thirds: Upon which the Matter was thus compromiſed by Conſent, and *Lord Chancellor* decreed that the Stock ſhould be ſold, and out of the Money produced thereby, 18,000 *l.* ſhould be taken, of which the Husband to have one Third, *viz.* 6000 *l.* to his own Uſe abſolutely; but in Conſideration thereof he ſhould quit his Eſtate for Life in the 12,000 *l.* which being the remaining two Thirds of the 18,000 *l.* ſhould go immediately to the Children and for their Benefit, out of which the Husband to have an Allowance for the Maintenance of them; and in the Settlement of the Land to be bought with that 12,000 *l.* the Husband's Eſtate for Life to be omitted. But here it being objected, that the eldeſt Son, as ſoon as he ſhould arrive at twenty-one, would be impowered by a Recovery to bar his Brother in his Father's Life-Time, and alſo the Father's Remainder in Fee; to prevent this it was propoſed and approved of by the Court, that there ſhould be a Limitation to the Father for Life, with Remainder as to the Land to be bought with this 12,000*l.* to the firſt, *&c.* Son of the Marriage; and the Father to make a Leaſe for ninety-nine Years if he ſhould ſo long live, in Truſt for the immediate Benefit of the eldeſt Son, by which Means the Freehold in the Father would prevent the Son's ſuffering a Recovery in the Father's Life-Time; and the Reſidue of the Money ariſing by Sale of the Stock, was directed to be inveſted in a Purchaſe and ſettled on the Father for Life, *&c.* according to the Agreement*.

Note; In this Caſe the Remainder to the firſt Son, though but an Eſtate-Tail, to an Infant, and ſo unalienable during ſuch Infancy, was valued at two Thirds like a Remainder in Fee; and notwithſtanding I mentioned to the Court that the Life Eſtate (eſpecially in the Caſe where the Tenant for Life had the Remainder in Fee) might be valued at two Fifths, which had been done in (*a*) ſome Caſes; yet the Court ſaid how equitable ſoever this might be, it was not the Practiſe, for which Reaſon it would be dangerous, and create Uncertainty to go out of the Rule, and Mr. *Goldsborough* the Regiſter ſaid, he had never known a Life valued at more than one Third.

(*a*) Vide 2 Vern. 267. Precedents in Chanc. 21, 44.

---

* By the Regiſter's Book the Name of this Caſe appears to be *Hubert* verſus *Fetherſton*, and was decreed the 5th of *April* 1720.

I DE

DE
Term. S. Trinitatis,
1720.

Upwell verſus *Halſey*.

Caſe 185.
At the Rolls.
One deviſes that ſuch Part of his Perſonal Eſtate as his Wife ſhould leave of her Subſiſtence ſhall go to his Siſter; Deviſe over good.

JOHN Moory being poſſeſſed of a Perſonal Eſtate of the Value of 333 *l.* and having a Wife and a Siſter (the Plaintiff) but no Iſſue, by Will gives 10 *l.* to his Siſter, and directs that ſuch Part of his Eſtate as his Wife *ſhould leave of her Subſiſtence* ſhould return to his Siſter and the Heir of her Body, and appointed his Wife Executrix.

On the Teſtator's Death the Wife married the Defendant, and afterwards died, upon which the Siſter ſued the Defendant the ſecond Husband for an Account of this Perſonal Eſtate.

Firſt, Againſt the Demand it was objected to have been formerly held, that even a Leaſe for Years could not be deviſed over after a Life, much leſs could a mere Perſonal Eſtate be ſo limited.

Secondly, That in this Caſe the Widow had a Power to diſpoſe of the whole, and her Marriage with the Defendant was a Gift in Law and an Execution of that Power; that Equity would not have compelled the Widow to give Security to the Siſter not to conſume the principal Money left by the Teſtator, in Regard ſuch intangling Deviſes have a Tendency towards a Perpetuity.

(*a*) See the Caſe of *Hyde* verſus *Parrot*, ante 1. and the Caſe of *Tiſſen* verſus *Tiſſen*, ante 502.

Sed per Cur': This Will is indeed ignorantly drawn, but if the Court can pick out the Meaning of it, that ought to take Place. It is now eſtabliſhed that a perſonal (*a*) Thing or Money may be deviſed to one for Life, Remainder over; and as to what has been inſiſted on, that the Wife had a Power over the capital or principal Sum, that is true, provided it had been neceſſary for her Subſiſtence, not otherwiſe; ſo that her Marriage was not a Gift in Law of this Truſt-Money.

Let the Maſter ſee how much of this Perſonal Eſtate has been applied for the Wife's Subſiſtence, and for the Reſidue of that which came to the Defendant the ſecond Husband's Hands, let him account.

Caſe 186.

Brown verſus *Barkham*.

Mortgagor reſerving 6 *l.* *per Cent.* with Proviſo to take 5 *l.* *per Cent.* if paid within three Months after due; if a great Arrear Court will not relieve; *ſecus* if but a ſmall Slip of Time.

ONE makes a Mortgage at 6 *l. per Cent.* Intereſt, with a Proviſo to accept 5 *l. per Cent.* if paid within three Months after due. There being a great Arrear of Intereſt, the Mortgagee ſends an Account in Writing of the Sum due to him for Intereſt, computing it at 6 *l. per Cent.* and the Mortgagor returns an Anſwer, allowing the Account, deſiring Forbearance, and promiſing to make Satisfaction to the Mortgagee for the ſame.

Object. This Letter ſigned by the Mortgagor, makes the Account a ſtated one; and the Intereſt from thence ought to carry Intereſt, ſince promiſing Satisfaction upon Forbearance can mean nothing elſe; and as the Account ſent in, was at the Rate of 6 *l. per Cent.* this Promiſe muſt be intended of ſome farther Satisfaction beyond that Intereſt: Alſo where the Mortgagor admits by Writing under his own Hand the *Quantum* of the Intereſt due, it is as ſtrong as when a Maſter by his Report computes it.

Interest computed by the Maſter's Report ſhall carry Intereſt.

(*a*) Ante *Bacon* verſus *Clerk*, 480.

But where the Mortgagor ſign'd an Account whereby ſo much is admitted to be due for Intereſt, this will not carry Intereſt, unleſs the Mortgagor by any Letter or Writing under his Hand agrees to make it Principal.

Lord *Parker:* It is true, a Maſter's Report computing Intereſt, makes that Intereſt Principal, and to carry (*a*) Intereſt; for a Report is as a Judgment of the Court, and appoints a Day for the Payment, carrying on Intereſt to that Day; and the Party's Diſobedience to the Court, in not complying with the Time of Payment, ought to ſubject him to Intereſt. But ſuppoſe the Mortgagor ſigns an Account whereby he owns ſo much Money due for Intereſt, I queſtion whether this will make the Intereſt Principal; becauſe of itſelf it does not ſhew any Agreement or Intent to alter the Intereſt or the Nature of that Part of the Debt, or turn it into Principal; neither does it appear to have been ever ſo determined. I conceive, to make Intereſt on a Mortgage Principal, it is requiſite there ſhould be a Writing ſigned by the Parties, for as much as the Eſtate in the Land is to be charged therewith; but in the Principal Caſe the Mortgagor does fulfil his Promiſe, by making Satisfaction to the Mortgagee for his Forbearance, ſince this Proviſo obliging the Party to pay 6 *l. per Cent.* on Default of paying 5 *l.* within three Months after due, is generally looked upon as a Penalty, and *in Terrorem*, and to be relieved againſt, if only a very ſhort

Time has happened, though it may not be relievable againſt in Caſe of a long Arrear of Intereſt. However, this 1 *l. per Cent.* is a Satisfaction, and a conſiderable one too.

But the Court at the ſame Time declared, if there had not been ſuch a Penalty of 6 *l. per Cent.* inſtead of 5 *l.* and a great Arrear of Intereſt incurred, it would, on ſuch a Promiſe in Writing to make a Satisfaction for Forbearance, have given the Mortgagee ſome Allowance in this Reſpect.

D E

DE
Term. S. Michaelis,
1720.

Taylor verſus *Dullidge Hoſpital in Surrey.*

Caſe 187.
Lord Chancellor Parker.

A College reſtrained by its Conſtitution from making any Leaſes, except for twenty-one Years, and at Rack-Rent, makes Orders, recommending it to their Succeſſors to renew at leſs than the Rack-Rent; this not favoured as tending to a Breach of the Statutes.

THE Hoſpital or College of *Dullidge* was ſeiſed in Fee of ſeveral Lands in Right of the College, and the Statutes relating to the Conſtitution of it, reſtrain from making Leaſes of the Lands other than for twenty-one Years, at the Rack-Rent. In 1696 the Hoſpital made a Leaſe to *John Taylor* the Plaintiff's Inteſtate for twenty-one Years, under what was then the Rack-Rent, which was to expire at *Michaelmas* 1717, the Leſſee had improved the Premiſſes by building two Houſes, and at the College Audit, which was kept twice a Year, every fourth of *March* and fourth of *September*, an Entry was made in the Regiſter, by which, in Conſideration that the ſaid *John Taylor* had built two Houſes on the Premiſſes, and thereby improved the ſame, therefore it was recommended that at the End of the Leaſe, the College ſhould make him a new Leaſe for twenty-one Years at the ancient Rent, without raiſing it; and this Entry was ſigned by the Maſter-

Warden and moſt of the Fellows. Afterwards when the Leaſe was near expiring, upon the Inteſtate's applying for a new one, the College at the Audit held on the 4th of *March* 1716 (the Leaſe being to expire on the *Michaelmas* following) made an Order that the Inteſtate ſhould have a new Leaſe of the Premiſſes from *Michaelmas* next, at the old Rent, and under the ſame Covenants, as the former; and this Order was ſigned by the Maſter-Warden and moſt of the Fellows. The Inteſtate died about the Time of the next Audit *September* 4. 1717. whereupon the Widow having taken out Adminiſtration, at the Audit in *March* following, applied for a new Leaſe according to the Order; but being refuſed, ſhe now brought a Bill to compel the College to make her a new Leaſe of the Premiſſes in Purſuance of their own Order; and *Allen* the Maſter-Warden was the Plaintiff's principal Witneſs.

It was alledged, that the Order for making a new Leaſe to the Inteſtate, did amount to an Agreement; and conſequently the Bill was proper to compel an Execution of it.

Lord Chancellor: The Maſter-Warden (Mr. *Allen*) who appears as a Witneſs in the Cauſe, betrays his Truſt in Relation to the College, and has acted inconſiſtently with the Oath he has taken as Warden; neither do I like the Recommendation made by the Maſter-Warden and Fellows to make a new Leaſe to the Inteſtate *Taylor*, at the old Rent; it being no leſs than a Recommendation to their Succeſſors to wrong the College, and break their Statutes, which ſay, that no Leaſe ſhould be made but at the Rack-Rents. As to the Signing of private Perſons, namely, the Maſter-Warden and Fellows, that cannot be ſuch a Contract as binds the College; for a Contract to bind that (or indeed any Corporation, as to

The ſigning of any Contract for leaſing by the Maſter and Fellows of the College, unleſs under the College Seal, not binding on the College.

to it's Revenue) muſt be under it's Common Seal. It is true, there would have been ſome Equity, if the Inteſtate had, after this Order for a new Leaſe at the old Rent, laid out Money in improving or building on the Premiſſes, in Confidence and Reliance on ſuch Order. However, even in that Caſe he ſhould have had his Reparation only from the private Perſons ſigning the Order, not againſt the College: As to the Repairs done by the Leſſee ſince the Order for the new Leaſe, theſe are no more than what by his old Leaſe he was obliged to do; for which Reaſons diſmiſs the Bill with Coſts.

Saunderſon verſus *Clagget*.

Caſe 188.

In B. R. Procurations are due of common Right for the Biſhop or (his Vicar) the Archdeacon's inſtructing the Clergy; and properly ſuable for in the Eccleſiaſtical Court.

DR. *Clagget*, Archdeacon of *Sudbury* in *Suffolk*, commenced a Suit in the Conſiſtory Court of the Biſhop of *Norwich*, for the Annual Sum of 6 *s.* 8 *d.* as a Procuration or Proxy due to the Archdeacon, for Viſitations.

The Libel was by Dr. *Clagget*, Archdeacon of the Archdeaconry of *Sudbury* in *Suffolk*, in the Cathedral Church of the *Holy Trinity* in *Norwich*, of the Foundation of King *Edward* VI. exhibited againſt *Saunderſon*, as Proprietor or Curate of the Appropriate Rectory of *Aſpal* in *Suffolk* (which is within the Archdeaconry of *Sudbury*) alledging, that the Archdeacon of *Sudbury* was of common Right, Endowment, or Cuſtom, entitled to the yearly Sum of 6 *s.* 8 *d.* for Procurations iſſuing out of the Appropriate Church of *Aſpal*, and that *Saunderſon* the Proprietor or Curate of that Church refuſed to pay it. Upon which

Saunderſon applied to *B. R.* for a Prohibition, and ſuggeſted, that this Rectory of *Aſpal* was Time out of

Mind a Rectory impropriate, without any Vicar endowed; that all the Tithes and Profits within the Rectory, Time out of Mind, belonged to the Proprietor thereof, who at his own Expence uſed to provide a Curate to celebrate Divine Service at the Pariſh Church of *Aſpal.*

The Court of *B. R.* having granted a Prohibition *Niſi*; I came to ſhew Cauſe againſt it, and urged, that of common Right every Parochial Church pays Procurations, or ſome annual Sum in lieu thereof to the Ordinary or Archdeacon; that accordingly Sir *John Davis* in his *Caſe of Proxies (fol. 6.)* ſays, "Procurations or "Proxies are as much due to the Superior Clergy, the "Ordinary, or Archdeacon (who is the Ordinary's "Vicar) as Tithes are of common Right due to the inferior Clergy." That Proxies and Tithes concur in all Points; for, 1*ſt*, as the Inſtruction of Laymen is the Origin of paying Tithes, ſo the Viſitation of the Ordinary (or of his Vicar the Archdeacon) which is accompanied with Inſtruction, is alſo the Origin of Parſons paying Procurations.

2*dly*, That as a Layman cannot preſcribe in Non-payment of Tithes, ſo the Parſon himſelf (at leaſt by the Common Law) cannot preſcribe in not paying of Procurations. And,

3*dly*, That as Unity of Poſſeſſion does not extinguiſh the Right of Tithes, ſo neither does the Unity of Poſſeſſion extinguiſh the Right of Procurations. The Unity of Poſſeſſion as to Procurations in Sir *John Davis's Reports* happened in this Manner; a Proxy of 20 *s. per Annum* was iſſuing out of an impropriate Rectory payable to a religious Houſe, both of them came to the Crown in Fee-ſimple, and this was held only a Suſpenſion, and no Extinguiſhment. Now, if the Payment of Procurations from every Parochial Church is of common Right, then the Party contending againſt common Right, ought to come with ſome Affidavit to ſupport his Suggeſtion for a Prohibition, (*viz.*) that his impropriate Rectory has been held and enjoyed free from the Payment of any Procurations, and reputed of Right to be ſo. This is expreſly ſaid in *Salk.* 549. *Godfrey* verſus *Lewellin*, where it was declared by *Holt* C. J. that if the Matter ſuggeſted for a Prohibition appears on the (*a*) Face of the Libel, the Court will not require an Affidavit; but where the Matter does not appear upon the Libel, in ſuch Caſe the other Side ought to have an Affidavit of the Truth of this Suggeſtion. *A fortiori* ought it to be ſo in this Caſe, where the Matter ſuggeſted for the Prohibition is contrary to the Libel, and againſt common Right. And indeed, if a bare Suggeſtion would do without an Affidavit, none could fail of a Prohibition, whereby the Hands of the Spiritual Court would (for ſome Time at leaſt) be tied up.

But ſurely this Suit for Procurations is proper for the Spiritual Court; the Duty ſued for [Procurations] is a Spiritual Duty; it is claimed by a Spiritual Perſon [the Archdeacon;] and in this Caſe (tho' an unneceſſary Ingredient) it is claimed from a Spiritual Perſon, the Curate of the Pariſh of *Aſpal*, who in his Suggeſtion for the Prohibition, gives himſelf the Addition of Clergyman.

It muſt be admitted, the Manner of this Archdeacon's intitling himſelf by the Libel to the Procuration of 6 *s.* 8 *d.* is by ſeveral Ways, of common Right, by Cuſtom, or by Endowment; and (with Submiſſion) every one of theſe Titles is tryable by the Spiritual Court;

(*a*) Ante 476. *Anonymus* Caſe, where the ſame Rule is ſaid to be obſerved in Chancery.

Court; for as they have Cognizance of the Principal, ſo have they the Cognizance of the Acceſſary, and that the Spiritual Court may try a Cuſtom relating to an Eccleſiaſtical Duty or Procuration, or that a Penſion claimed by a Spiritual Perſon by Preſcription may be ſued for in the Spiritual Court, is held (*a*) 1 *Vent*. 3, 5. 2 *Vent*. 238. *Williams* verſus *Bond*, *Salk*. 550. *Jones* verſus *Stone*; ſo a *Modus decimandi* may be ſued for in the Spiritual Court, and every *Modus* muſt be grounded upon a Cuſtom. There is indeed an Act of Parliament relating to this Matter of Proxies, the 34 and 35 *Hen*. 8. *cap*. 19. which recites, "That "ſeveral Biſhops and Archdeacons having Penſions and "Proxies out of religious Houſes, upon the Diſſolution of theſe religious Houſes, and on their Poſſeſſions being veſted in the Crown, ſuch Biſhops and "Archdeacons had been diſturbed in the Enjoyment of "their Penſions and Proxies, notwithſtanding the Saving in the Act of Diſſolution of *the Rights of all* "*Perſons other than the Founders*; for Remedy whereof "it is enacted, That where any of the Biſhops or Archdeacons have been ſeiſed of Penſions and Proxies within ten Years next before the Diſſolution of theſe religious Houſes, ſuch Biſhops and Archdeacons ſhall "recover the ſame in the Spiritual Court, with their "Damages and Coſts."

Now this Act ſhews that we are in a proper Court, while we are ſuing in the Spiritual Court for Procurations.

But it may be objected, that it ought to be ſaid in the Libel, that this Proxy of 6 *s*. 8 *d*. was paid within ten Years before the Diſſolution of the religious Houſe, to which this appropriate Rectory did belong.

(*a*) And *note*, that in 1 *Vent*. 3. and *Salk*. 550. Lord *Coke*'s Opinion in 2 *Inſt*. 491. to the contrary, is denied to be Law.

To which we anſwer, that this Proxy of 6 *s.* 8 *d.* is ſaid to have been paid Time out of Mind, and if ſo, then it muſt have been paid within ten Years before the Diſſolution of the Abbies, *&c.*

It may alſo be objected, that it ſeems impoſſible the Archdeacon of *Sudbury* could be ſeiſed of this Procuration of 6 *s.* 8 *d.* ten Years before the Diſſolution of the Religious Houſe to which this appropriate Rectory did belong; foraſmuch as upon the Face of the Libel it appears, that this very Archdeaconry was founded after the Diſſolution of the Abbies, *viz.* in *Edward* the VIth's Time.

Anſw. All that appears by the Libel is, that the Cathedral Church of the Holy Trinity of *Norwich* was founded in *Edward* the VIth's Time, but the Archdeaconry of *Sudbury* might be founded long before *: Beſides, if Proxies were due from all Pariſhes of common Right, (as plainly they were) they muſt conſequently be as plainly due and payable to ſome Perſon or other, to ſome Archbiſhop, Biſhop or Archdeacon within whoſe Juriſdiction this Church then was, before the Foundation of the Archdeaconry; and it ſeems ſufficient if the Proxy of 6 *s.* 8 *d.* was payable to ſome Perſon or other: Neither can it be thought that the Biſhop of *Norwich* claims it, for it is in the Biſhop of *Norwich*'s own Court that the Archdeacon ſues, ſo that it is evident Proxies are due to ſome Body in this Caſe, and as evident that no Perſon claims them but the Archdeacon; therefore they ought to be paid to him.

---

* Of this Opinion was Mr. Juſtice *Eyre*, who cited the Dean and Chapter of *Norwich*'s Caſe, 3 *Co.* 73.

But farther, our Title in the Libel is not laid to be by Cuſtom only, but by Endowment; and if, as the Fact is, and we can prove, that for fifty, ſixty, or ſeventy Years, and by ancient Books in the Regiſter's Office belonging to the Archdeaconry, this Sum of *6 s. 8 d.* has been paid; it ſeems to be good Evidence of an Endowment, tho' the Writing of ſuch Endowment be loſt; and this Title of Endowment is properly tryable in the Spiritual Court.

Upon the whole Matter, I hope the Court will not grant this Prohibition.

It is but a ſmall Matter in Controverſy, (*6 s. 8 d.* a Year;) it is plainly proper for the Eccleſiaſtical Court; the Nature of the Duty is Eccleſiaſtical; it is claimed by an Eccleſiaſtical Perſon; it is alſo claimed from an Eccleſiaſtical Perſon; for all which Reaſons it is ſurely proper to be ſued for there.

It being moved again on another Day, all the Court, *viz. Pratt* Chief Juſtice, *Powys*, *Eyre* and *Forteſcue* Juſtices, diſcharged the Rule for a Prohibition, and delivered their Opinions *ſeriatim*;

1*ſt*, That this was an Eccleſiaſtical Duty, and therefore properly ſuable for in the Spiritual Court.

2*dly*, That it was claimed both *by* and *from* an Eccleſiaſtical Perſon, which made it the ſtronger.

3*dly*, That tho' there was an Impropriation in the Caſe, ſtill there muſt be a Curate to take Care of the Souls of the Pariſh; and that Curates, as well as other Perſons, muſt ſtand in Need of Biſhops or Archdeacons Inſtructions and Viſitations: Conſequently,

4*thly*, That

4thly, That the Ordinary or Archdeacon ought to be allowed for his Procuration, what had been uſually paid for it, which here apppeared to be 6 *s.* 8 *d.*

5thly, That where a Thing is claimed by Cuſtom in the Spiritual Court, it muſt be intended according to their Conſtruction of a Cuſtom, and by their Law (*a*) forty Years make a Cuſtom or Preſcription.

(*a*) 2 Inſt. 649, 653, 654.

6thly, That the Payment of 6 *s.* 8 *d.* for 70 or 80 Years was an Evidence of an immemorial Payment; but if it could not be ſtrictly immemorial, as taking the Archdeaconry to have been founded in *Edward* the VIth's Time, ſtill ſince that Period, it might become due by Endowment, which might in this Diſtance of Time have been loſt.

Memorandum: In this Caſe a Prohibition had been moved for in Vacation before the *Maſter of the Rolls*, who firſt granted it *niſi cauſa*; but afterwards upon Motion, inclined to think Proxies due of common Right; and tho' this Proxy could not have been due *Time out of Mind* to the Archdeacon of *Sudbury*, if that Archdeaconry was founded in *Edward* the VIth's Time, yet being due to *ſome Perſon or other Time out of Mind*, it might afterwards come by Endowment to the Archdeacon; and that this was to be preſumed from the Payment to ſuch Archdeacon for ſeventy or eighty Years.

Forth verſus *Chapman*.

Caſe 189.
Lord Chancellor Parker.

THIS Cauſe was reſerved for the Judgment of the *Maſter of the Rolls*, who after Time taken to conſider thereof, gave his Opinion (*b*). The Caſe was,

(*b*) 17 Nov. 1719.

One poſſeſſed of a Term deviſes it to *A.* and *B.* and if either of them died and leave no Iſſue of their reſpective Bodies, then to *C.* This held a good Limitation to *C.* if *A.* or *B.* left no Iſſue at their Death.

One *Walter Gore* by Will deviſes thus: All the Reſidue of his Eſtate real and Perſonal he gave to *John Chapman* in Truſt, only the Leaſe of the Ground he held of the School of *Bangor*, for the Uſe of his Nephews *William Gore* and *Walter Gore* during the Term * of the Leaſe as herein after limited, and having given ſeveral Legacies, declared his Will as to the Remainder of the ſaid Eſtate, as well as his Freehold Houſe in *Shaw's Court*, with all the reſt of his Goods and Chattels whatſoever and whereſoever, he gave to his Nephew *William Gore*; and if either of his Nephews *William* or *Walter ſhould depart this Life and leave no Iſſue of their reſpective Bodies*, then he gave the ſaid [Leaſehold] Premiſſes to the Daughter of his Brother *William Gore*, and the Children of his Siſter *Sibley Price*; upon which the Queſtion aroſe, whether the Limitation over of the Leaſehold Premiſſes to the Children of the Deviſor's Brother and Siſter, was void as too remote?

The Court was of Opinion that the Deviſe over was void, and ſaid that had the Words been, if *A.* or *B.* ſhould die without iſſue, the Remainder over; this plainly would have been void, and exactly the Caſe of *Love* and *Windham*, 1 *Sid.* 450. 1 *Vent.* 79. 1 *Mod.* 50.

Now there is no Diverſity betwixt a Deviſe of a Term to one for life, and if he die without Iſſue, Remainder over, and a Deviſe thereof to one for Life, with ſuch Remainder, if he die leaving no iſſue; for both theſe Deviſes ſeem equally relative to the Failure of Iſſue at any Time after the Teſtator's Death; and for this the Court cited and much relied upon 1 *Leon.* 285. *Lee*'s Caſe, where one deviſed Lands to his ſecond Son *William*, and if *William* ſhould depart this Life not

---

* In the *Regiſter-Book* it is ſaid *Termination*.

having Iſſue, then the Teſtator willed that his Sons-in-Law ſhould ſell his Lands, and died: *William* had Iſſue a Son at the Time of his Death, who afterwards died without Iſſue; upon which it was clearly reſolved by the whole Court, that though literally *William* had Iſſue a Son at his Death, yet when ſuch Iſſue died without Iſſue, there ſhould be a Sale; for at what Time ſoever there was a Failure of Iſſue of *William*, he upon the Matter died without Iſſue. And in a *Formedon* in Reverter or Remainder, whenever there is a Failure of Iſſue, then is the * firſt Donee, in Suppoſition of Law, dead without Iſſue.

His Honour mentioned the Caſe of *Hughes* and *Sayer*, Ante 534.
which he himſelf upon Conſideration had determined; and ſaid there was a Diverſity betwixt Iſſue and Children, Iſſue being *nomen Collectivum*; and alſo between Things merely Perſonal and Chattels real; more particularly in the Caſe of *Hughes* and *Sayer*, by the Deviſe over of the Money to the Survivor, if either of the Donees ſhould die without Children, the Teſtator of Neceſſity muſt be intended to mean a Death of the Donee without Children living at his Death; for to wait until a Failure of Iſſue, might be to wait for ever.

It being alſo debated by Council, where the Reſidue of the Term veſted, in Regard the Deviſe was to *William* and *Walter Gore*: The Court declared that the ſubſequent Words increaſed their Intereſt, and gave the whole Term to them, it being plainly intended to diſ-

---

* For which Reaſon, altho' the firſt Donee had many Iſſues in lineal Deſcent inheritable to the Eſtate-tail, and who held the Eſtate, the Demandant need not name any of the Iſſues in the Clauſe [*et quæ poſt mortem, &c.*] but ſhall ſay, *et quæ poſt mortem* of the Donee *ad ipſum reverti* or *remanere debet*, *eo quod* the Donee died without Iſſue. 8 *Co.* 88. *a.* *Buckmere*'s Caſe.

poſe of and deviſe away the whole Term from the Teſtator's Executors; that a Deviſe of a Term to one for a Day or an Hour, is a Deviſe of the whole Term, if the Limitation over is void, and it appears at the ſame Time that the whole is intended to be diſpoſed of from the Executors.

(*a*) Sab. 25 July.

Afterwards in (*a*) *Trin. Term.* 1720. This Caſe coming before Lord *Parker* upon an Appeal, his Lordſhip reverſed the Decree; and ſaid, That if I deviſe a Term to *A.* and if *A.* die without leaving Iſſue, Remainder over, in the vulgar and natural Senſe, this muſt be intended (*b*) if *A.* die without leaving iſſue at his Death, and then the Deviſe over is good; that the Word [Die] being the laſt antecedent, the Words [without leaving Iſſue] muſt refer to that. Beſides, the Teſtator who is *inops Concilii*, will, under ſuch Circumſtances, be ſuppoſed to ſpeak in the vulgar, common and natural, not in the legal Senſe.

(*b*) Vide ante in *Nicholls* verſus *Hooper*, 199. and *Target* ver. *Gaunt*, 432. and *Pinbury* verſus *Elkin*, 564, 565.

His Lordſhip likewiſe took Notice that in a *Formedon* in Remainder, where Tenant in Tail leaves Iſſue, which Iſſue afterwards dies without Iſſue, whereupon ſuch Writ is brought, the *Formedon* ſays *, that the Tenant in Tail did die leaving Iſſue *J. S.* which *J. S.* died afterwards without Iſſue, and ſo the firſt Donee in Tail died without Iſſue, thus the Pleading ſays, that the Donee in Tail died leaving Iſſue at his Death; conſequently the Words [leaving Iſſue] refer to the Time of the Death of the Tenant in Tail, and if the Words of a Will can bear two Senſes, one whereof is more common and natural than the other, it is hard to ſay a Court ſhould take the Will in the moſt uncommon Meaning; to do what? to deſtroy the Will.

---

* *Quære*, and ſee the *Regiſter of Writs*, and 8 *Co.* 88. *a.*

2*dly*, He ſaid that the Reaſon why a Deviſe of a Freehold to one for Life, and if he die without Iſſue, then to another, is determined to be an Eſtate-tail, is in Favour of the (*a*) Iſſue, that ſuch may have it, and the Intent take Place; but that there is the plaineſt Difference betwixt a Deviſe of a Freehold, and a Deviſe of a Term for Years; for in the Deviſe of the latter to one, and if he die without Iſſue, then to another, the Words [if he die without Iſſue] cannot be ſuppoſed to have been inſerted in Favour of ſuch Iſſue, ſince they cannot by any Conſtruction have it.

(*a*) *Vide ante* the Caſe of *Target* verſus *Gaunt*, 433.

3*dly*, His Lordſhip obſerved what ſeemed very material, (and yet had been omitted in the Pleadings, and alſo by the Counſel at the Bar) that by this Will the Deviſe carried a * Freehold as well as a Leaſehold Eſtate to *William Gore*, and if he or *Walter* died leaving no Iſſue, then to the Children of his Brother and Siſter, in which Caſe it was more difficult to conceive how the ſame Words in the ſame Will, at the ſame Time ſhould be taken in two different Senſes. As to the Freehold, the Conſtruction ſhould be, if *William* or *Walter* died without Iſſue *generally*, by which there might be *at any Time* a Failure of Iſſue; and with reſpect to the Leaſehold, that the ſame Words ſhould be intended to ſignify their dying without leaving Iſſue *at their Death*: However, *Lord Chancellor* ſaid it might be reaſonable enough to take the ſame Words, as to the different Eſtates, in different (*b*) Senſes, and as if repeated by two ſeveral Clauſes, (*viz.*) I deviſe to *A.* my Freehold Land, and if *A.* die without leaving Iſſue, then to *B.* and I deviſe my Leaſehold to *A.* and if *A.* die without leaving

(*b*) Vide 2 Vol. 140. in *Harris* verſus *Biſhop of* Lincoln.

---

* By the Will, as it is ſtated above, from the *Regiſter*'s *Book*, both in the State of the Caſe at the *Rolls*, and on the Appeal, the Limitation over was expreſly reſtrained to the *Leaſehold*; but in Lord *Macclesfield*'s Notes that Word is omitted, and the Deviſe over is general.

ving Iſſue, then to *B.* in which Caſe the different Clauſes would (as he conceived) have the different Conſtructions above-mentioned to make both the Deviſes good; and it was reaſonable it ſhould be ſo, *Ut res magis valeat quam pereat.*

Caſe 190. *Lord Chancellor* Parker.

Marſh verſus *Evans.*

One having two Sons and a Daughter, by Will gives to each 2000 *l.* payable at twenty-one, provided if Aſſets fall ſhort to pay the Legacies, the Abatement ſhall be born out of the Sons Legacies. Teſtator leaves Aſſets to pay, which the Executrix waſtes; the Daughter's Legacy ſhall have the Preference.

THE Teſtator having two Sons and a Daughter, by his Will, of which he made his Wiſe Executrix, gives 2000 *l.* a-piece to his two Sons, and 2000 *l.* to his Daughter, payable at twenty-one or Marriage, with a Proviſo, that if his Aſſets ſhall fall ſhort for the Payment of theſe Legacies, ſtill the Daughter ſhall be paid her full Legacy, and that the Abatement ſhall be born proportionably out of the Sons Legacies only. The Teſtator leaves ſufficient to pay all the Legacies, but the Executrix waſted the Aſſets, and by that Means only there happened a Deficiency.

Decreed by the *Maſter of the Rolls,* that the Teſtator could never intend to make good the Daughter's Legacy at the Expence of the Sons, againſt the Waſting of the Executrix; that the Eſtate could not properly be ſaid to fall ſhort, the Teſtator leaving Aſſets to pay all his Legacies; nor could it be preſumed he foreſaw his Executrix would waſte his Aſſets, for then he would not have made her ſo: Wherefore this being a Caſe unforeſeen, was unprovided for by the Teſtator, and conſequently the Daughter ought to abate in Proportion.

But on Appeal to the *Lord Chancellor,* this Decree was reverſed; for that here was a plain Preference given to the Daughter's Portion before thoſe of the Sons; and this Caſe was within the Words, the Eſtate actually falling ſhort to pay the Legacies; that as the Teſtator had not reſtrained it to any particular Means by which the Aſſets ſhould fall ſhort, it muſt be taken generally, *viz. if by any Means* there ſhould be a Deficiency; for ſtill the Damage was the ſame to the Daughter, whom the Father ſeemed in all Events to have provided for with a Portion of 2000 *l.* His Lordſhip put this Caſe, Suppoſe the Eſtate had after the Teſtator's Death, fallen ſhort thro' a Loſs by Fire, or by a bad Title on which Money had been lent, neither of which could have been foreſeen by the Teſtator, ſurely both theſe Accidents would come within the Proviſion of the Will, and the Daughter ſhould have her full Portion of 2000 *l.* that it was the ſame Thing as if the Teſtator had ſaid, his Daughter's Portion ſhould be paid *in the firſt place*; and the Conſtruction which the other Side would put on this Clauſe, was to make no Diſtinction where the Teſtator has made a very plain one. Wherefore let both the Words and Meaning of the Will take Effect, that is, let the Daughter have her full Portion, and the Abatement be made only out of the Sons Legacies.

Attorney General verſus *Grant Rector of St. Dunſtan*'s.

Caſe 191.
Lord Chancellor Parker.

Liberty of the *Rolls* in *Middleſex* is within the Pariſh of St. *Dunſtan* in the Weſt, *London*, and contributes a Fifth towards the Repairs of the ſaid Church; but having diſtinct Overſeers, and maintaining its Poor ſeparately, is not intitled to a Share of the Charities given by Will or Deed to the Poor of St. *Dunſtan*'s, tho' intitled to a Fifth of all Collections made at the Church Doors, or at Sacraments.

AN Information was brought in the Name of the Attorney General at the Relation of the Inhabitants of the *Rolls* Liberty, againſt the Impropriator, Curate, and Overſeers of the Poor of the Pariſh of St. *Dunſtan* in the Weſt, *London*, for an Account of Charities given by ſeveral Wills and Deeds, to the Poor of the ſaid Pariſh; and as the Liberty of the *Rolls* was Part of the Pariſh of St. *Dunſtan*, and the Inhabitants of that Liberty, on the ſaid Pariſh Church being lately repaired, had been aſſeſſed, and paid a fifth Part towards the Repairing thereof, (*viz.* 300 out of 1500 *l.*) therefore it was prayed, that the *Rolls* Liberty might have a Fifth of all the Charities by Will or Deed given to the Poor of St. *Dunſtan*'s, as likewiſe of the charitable Collections made at the Door of the Church, or at Sacraments.

It ſeems the Pariſh of St. *Dunſtan*, with Regard to ſuch Part thereof as is within the City of *London*, has ſeparate Officers, both Church-Wardens, and Overſeers, and maintain their Poor ſeparately; in like Manner that Part which is within the County of *Middleſex*, and Liberty of the *Rolls*, hath diſtinct Officers for the Poor; but as to the Chapel, that only belongs to the *Maſter of the Rolls*, who *ex gratiâ* gives Leave to the Inhabitants of the Liberty to come there.

Before the Statute 43 *Eliz.* there were no ſuch Officers as Overſeers of the Poor.

Lord *Parker*: Before the Statute of the 43 of *Eliz.* there were no ſuch Officers as Overſeers of the Poor; *ſince* which, as that Part of the Pariſh of St. *Dunſtan* which lies in *London*, has had diſtinct Overſeers, made diſtinct Rates, and maintained their Poor ſeparately, this makes them as a diſtinct Pariſh; for which Reaſon, with Reſpect to all Gifts of Charities by Will or Deed given to the Pariſh of St. *Dunſtan* in the Weſt, that Part of the Pariſh which lies in *London* muſt have and enjoy the ſame, excluſive of the *Rolls* Liberty; but as to all ſuch Gifts, Grants or Deviſes *before* the Statute of the 43 *Eliz.* as at that Time the Pariſh and Liberty were not ſeparated by diſtinct Officers and Overſeers of the Poor, the Liberty of the *Rolls* being then Part of the Pariſh, ſhall have a Proportion thereof: But the Liberty having contributed to the Repairs of the Church, and being really within that Pariſh, as to all Collections of Charities at the Church Door, or at the Poor's Box, or at the monthly or other Sacraments, which are in Part given by the Inhabitants of the *Rolls* Liberty who have Seats in, and repair to the Church of St. *Dunſtan*; and foraſmuch as the Inhabitants of the *Rolls* Liberty pay towards the Parſon and Lecturer of St. *Dunſtan*'s (there being in Vacation Time no Preaching at the Roll's Chapel) and contribute to the Charities of St. *Dunſtan*'s: So ought the Poor of the *Rolls* Liberty (being Part of the ſaid Pariſh) to have a proportionable Share of thoſe Charities; wherefore to the Intent it may be ſeen whether this has been obſerved, let the Diſpoſitions of theſe laſt mentioned Charities be ſpecified in a Book containing the Names of the Perſons to whom given, and for what Purpoſe.

Memorandum: It being ſaid in this Caſe, that as to the Charity Money given at Sacraments, the Parſon was not bound to diſtribute it amongſt the Poor of the ſame Pariſh, but might beſtow it on any Object of Charity:

Cur': I will not now determine this, tho' ſurely if equal Objects of Charity are to be found within the Pariſh, they in Reaſon ought to be preferred.

Leighton verſus *Sir Edward Leighton*.

Caſe 192.

In Caſe of a Truſt-Eſtate deviſed to be ſold, or deviſed to *J. S.* if the Will be diſputed, after two Trials in Favour of the Will, Equity will grant a perpetual Injunction.

THE Defendant Sir *Edward Leighton*'s Father mortgaged, and afterwards ſold the Manor of *Balſley* in the County of *Montgomery* in *Wales*, to his Brother the Plaintiff, and upon his Death the now Sir *Edward Leighton* ſet up an old Intail created about 200 Years ſince, and got into Poſſeſſion; the Plaintiff brought an Ejectment which was tried in *Wales*, and a Verdict paſſed for the Defendant upon producing an old Inquiſition finding the Intail; but there was no Deed produced creating this Intail.

The Plaintiff at Law brought his Bill in this Court, ſetting forth that the Writings were all in the Defendant's Hands, and praying that they might be produced, and that the Defendant might not ſet up a Title under any Truſt-Term. Upon which the Lord *Cowper* decreed, that the Trial ſhould be upon the *mere Right* in an Ejectment; and that no Truſt-Term, Mortgage or Leaſe ſhould be ſet up, but that the Defendant ſhould make Title only under the Intail.

Accordingly it was tried in *Shropſhire*, where before Mr. *Baron Price*, the now Defendant Sir *Edward Leighton* had a Verdict; but the Judge certifying againſt it, a new Trial was granted to be at the Bar of the *Exchequer*, which was had, and a Verdict for the Plaintiff: There was afterwards a Trial likewiſe in the *King's Bench*, and a Verdict again for the Plaintiff. And now on the Equity reſerved, it was prayed that the Plaintiff ſhould have a perpetual Injunction with Coſts.

Lord *Parker*: The Plaintiff has no Reaſon to complain (as he does) of the Inconvenience, that there is no End of Trials in Ejectments, for the two firſt were found againſt him; but it is true, the two Trials at Bar which were by the Direction of the Court, being for him, I do not ſee what this Court has been doing, unleſs it ſhould now grant a perpetual Injunction. If a Truſt Eſtate be deviſed to be ſold, and on a Bill brought againſt the Truſtees to ſell, the Heir conteſts the Will; after two Trials, the Court will grant a perpetual Injunction. In the Caſe of the *Earl of* (a) *Bath* verſus *Sherwin* the Title was a mere legal one, where after ſeveral Ejectments and five Verdicts for the *Earl of Bath*, he brought a Bill of Peace for a perpetual Injunction; the Lord Chancellor *Cowper* thought this too much for

(a) Preced. in Chancery 261.

So after ſeveral Trials in Ejectment, and Verdicts in all, in Favour of the Will, Equity on a Bill of Peace will grant a perpetual Injunction.

for him to grant, but ſeemed to recommend it to the Plaintiff as a Cauſe proper for the Houſe of Lords; and on an Appeal, the Lords granted a perpetual Injunction, which I take as a Reverſal of the Lord *Cowper*'s Decree, and as a Precedent in the higheſt Court of what ought to be in this Caſe. Conſequently it is very improperly ſaid, that only the Houſe of Lords in ſuch Caſe ſhould grant a perpetual Injunction; for that Houſe on Appeal gives ſuch a Judgment as the Court below ought to have done. This Court in directing Trials, and ordering Writings to be produced, has been doing nothing all this while, if it cannot grant a perpetual Injunction, which really after ſo many Trials ſeems to be for the Benefit of both Parties.

Equity will the rather grant a perpetual Injunction where it directs the Trial, or where the Cauſe againſt which the Verdicts are found, is odious in its Nature.

As to the Objection, that in the Caſe of the *Lord Bath* verſus *Sherwin*, the Lords would not have granted a perpetual Injunction, but for its being an odious Cauſe, tending to Baſtardize a noble Perſon after his Death; I anſwer, It did not tend to Baſtardize the Duke of *Albemarle*, but to make him the legitimate Son of *Radford*. However, the principal Caſe is ſuch as not in its Nature to be intitled to any Favour; for the Defendant Sir *Edward Leighton* is contending againſt a Purchaſe, under which there has been Poſſeſſion for very many Years, againſt a Sale made by his own Father to his Brother, and is ſetting up an old Intail of about two hundred Years ſtanding to defeat this Purchaſe; and if there was not the cleareſt Proof imaginable of ſuch an Intail, (as poſſibly there was not) the Jury were in the Right not to find it. It is certainly an Inconvenience in the Law, that there ſhould be no End of Trials in Ejectment, and that one Trial in a real Action (which perhaps may be at a Trial by *Niſi prius*) ſhould be final, when at the ſame Time twenty Trials in Ejectment and at the Bar in *Weſtminſter Hall* will not be concluſive; but this cannot properly be urged in the preſent Caſe, when upon the two or three firſt Ejectments the Verdicts went againſt the now Plaintiff, who, had they been concluſive, muſt have been barred.

But as to the Coſts in this Court, the Plaintiff *William Leighton* has had Relief by producing the Writings, and preventing the Defendant from ſetting up any old Terms; and it does not appear that the Defendant Sir *Edward Leighton* (the Heir of an ancient Family) has ſo far misbehaved, as that he ought to pay Coſts; though he ſhall loſe his own Coſts, the Right appearing againſt him; but the Plaintiff to have the Coſts at Law for all the Trials.

(*a*) March 1720.

This Decree was affirmed (*a*) in the Houſe of Lords with 40 *l.* Coſts.

Caſe 193.

Lord Chancellor Parker.

Attorney General verſus *Hudſon.*

Two Schools in the ſame Town, one a Free School, and the other a Charity School for Boys and Girls; *A.* deviſes 500 *l.* to the Charity School; tho' both be Charity Schools, yet only the Charity School for Boys and Girls ſhall take.

ONE *Penning* of *Saffron Walden* in *Eſſex*, and ſeveral others ſubſcribed to a Charity School there of twelve Boys and twelve Girls, which Subſcription was only during the Pleaſure of the Benefactors. *Penning* delighted with ſeeing theſe Charity Children, declared he would leave them ſomething at his Death; there was alſo a Free School in the ſame Town, and *Penning* made his Will giving 500 *l.* *to the Charity School*, and ſeveral pecuniary Legacies to his poor Relations, and died.

The Executors inſiſted on the Want of Aſſets.

Lord Chancellor: Though the Free School be a *Charity School*, yet the Charity School for Boys and Girls went more commonly by that Name; and as the Teſtator was fond of the *latter*, and declared he would leave them a Legacy, therefore *That*, and not the Free School is intitled thereto; ſo let the Legacy be brought into Court with Intereſt from the End of the Year after the Teſtator's Death; and in Caſe of a Deficiency of Aſſets, let all the pecuniary Legacies, as well that to the Charity [*] as others, abate in Proportion; for though the *Romans* preferred a pious or charitable Legacy to others, yet our Law does not: They being all but Legacies, and equally intended by the Teſtator to be paid, it would be hard that one of them by being preferred ſhould fruſtrate all the reſt; beſides the other Legacies being given to ſeveral of the Teſtator's poor Relations, they are Charities alſo. And becauſe it is objected, that on the Failing of the Charity School, the Charity ought to revert to the Founder, therefore in ſuch Caſe I give Liberty to the Parties to apply again to the Court.

Legacy to a Charity ſhall abate in Proportion with other Legacies on Failure of Aſſets.

Pool verſus *Sacheverel*.

Caſe 194. *Lord Chancellor* Parker.

Advertiſement inſerting in the publick Prints, that whoever ſhall diſcover and make legal Proof of the Marriage in Queſtion, ſhall have 100 *l.* Reward, adjudged a Contempt of the Court, and the Party procuring it committed.

IN a Bill brought touching the real and perſonal Eſtate of —— *Sacheverel* deceaſed, who had Iſſue a Daughter by his firſt Wife, married to the Plaintiff *Pool*, the Queſtion was, Whether the Defendant who before had been Mr. *Sacheverel*'s Maid-Servant, was married to him?

She admitted by her Anſwer, that ſhe had a Baſtard by him which was yet living, but before the ſecond Child was born ſhe pretended ſhe was married to the ſaid *Sacheverel*, and that they had been married in the Priſon of the *Fleet*, he by the Name of *Robert Marſhal*, and ſhe by the Name of *Anne How* Spinſter, and that the Marriage was on the 27th of *November* 1705.

---

[*] Vide ante *Tate* verſus *Auſtin*, 265. and *Maſters* verſus *Maſters*, 422. but the Spiritual Court gives the Preference to Charity Legacies, and in ſuch Caſe Lord Keeper *North* would not injoin them. Vide 1 *Vern.* 230. *Fielding* verſus *Bond*.

In the Spiritual Court it was adjudged to be a good Marriage, and that Sentence affirmed by the Delegates; but the Daughter claiming Title to a Moiety of the real Eſtate, a Trial at Bar was directed in *C. B.* where the Marriage was found; and afterwards the Plaintiff's Father put an Advertiſement into the *Daily Courant*, intimating, that whereas there was an Entry in the Regiſter in the *Fleet* Priſon, of a Marriage there the 27th of *November* 1705, in the Words and Figures following, (*viz.*) "*November* 27. 1705. *Robert Marſhall* of "St. *Martin's Lane* in St. *Martin*'s Pariſh, and *Anne How* "Spinſter:" Whoever ſhall diſcover and legally prove that the ſaid two Perſons were then married, and before and at the Time of the Marriage were really called and known by thoſe reſpective Names, ſhall have a Reward for ſuch Diſcovery (on legal Proof of the ſame) of 100*l.* over and above all legal Charges to be paid by *Edward Pool.*

And it was now moved that *Pool* ſhould be committed; it having been formerly mentioned before *the Maſter of the Rolls*, who ordered it to be moved before the *Lord Chancellor*, as being a Matter of great Moment, concerning on one Side, the Liberty of the Subject, and on the other, the Preſervation of Evidence from Subornation and Corruption.

The Motion being made before *Lord Chancellor*, it was by him adjourned to the next Seal, after which at another Day the *Lord Chancellor* with great Solemnity thus pronounced his Opinion:

This tends to the Suborning of Witneſſes, is very dangerous, and not only greatly Criminal, but is a Contempt of the Court, being a Means of preventing Juſtice in a Cauſe now depending, which is aggravated by the Marriage having been pronounced good in the Court of Delegates, and alſo a Verdict at the Bar of the Common Pleas in it's Favour; and as the Court may, ſo in Juſtice it ought, to puniſh this Proceeding.

It has been objected, that nothing has been done in Conſequence of this Advertiſement, no Witneſs come in.

Reſp. It does not appear but that ſome Perſon would come in, were this not diſcouraged; however the Perſon moved againſt has done his Part, and if not ſucceſsful, is ſtill not the leſs criminal.

Object. This is not an Offer to any particular Perſon.

Reſp. It is equally criminal when the Offer is to any, for to *any* is to every particular Perſon. This Advertiſement will come to all Perſons, to Rogues as well as honeſt Men; and it is a ſtrange Way of arguing to ſay, that offering a Reward to one Witneſs is criminal, but that offering it to more than one is not ſo: Surely it is more criminal, as it may corrupt more.

Object. A Perſon coming in for ſuch a Reward is no Witneſs, for that his Teſtimony muſt be rejected.

Reſp. It is ſo of every Witneſs ſuborned or bribed; he is no Witneſs, if you prove him bribed.

Object. This Matter is now over, (*viz.*) the Sentence in the Spiritual Court and the Trial.

Reſp. It is not over; for ſuppoſe, on the Reward offered by this Advertiſement, a Dozen Affidavits ſhould come in, proving what is deſired may be proved, this would probably induce the Court to grant a new Trial, and might overturn all the Proceedings which have hitherto paſſed. It is a Reproach to the Juſtice of the Nation, and an inſufferable Thing, to make a publick Offer in Print to procure Evidence, and is tantamount to ſaying, that ſuch Perſons as will come in and ſwear, or procure others to ſwear ſuch a Thing, ſhall have 100 *l.* Reward; and this in a Cauſe now depending here: If 100 *l.* is to be allowed, the ſame Reaſon will hold as to the allowing of 500 *l.* or 1000 *l.* And tho' the Intention of the Perſon ſo advertiſing may be innocent, (and I, knowing the Man, believe it was ſo, inſomuch that if a Court may be ſaid to have Inclinations or Impreſſions from thence, I muſt own, I ſhould be influenced by my knowing Mr. *Pool* to be an honeſt Man:) Yet the Juſtice of the Court, nay the Juſtice of the Nation being concerned in ſo publick a Caſe, I cannot diſmiſs the Party, tho' his Counſel offer to pay Coſts to the other Side, but in Juſtice, and for Example's Sake, he muſt ſtand committed.

Caſe 195.

Clifton verſus *Burt.*

One dies indebted by Bond, and by Will gives a Legacy of 500 *l.* and deviſes his Lands in Fee to *J. S.* leaving a perſonal Eſtate ſufficient only to pay the Bond; the Legatee ſhall not ſtand in the Place of the Bond Creditor to charge the Land, in regard the Land is ſpecifically deviſed; *ſecus* if the Land had deſcended to the Heir.

A. Seiſed in Fee of Freehold Lands, and likewiſe of ſome Copyhold Lands which he had not ſurrendered to the Uſe of his Will, and indebted by Bond in which his Heirs were bound, in 1706 made his Will, whereby he deviſed his Freehold Lands to *B.* in Fee, without charging them with any of his Debts and Legacies,

gacies, and gives his Copyhold Lands to *C.* in Fee, in Truſt to ſell to pay his Debts and Legacies, and having given a Legacy of 500 *l.* to *D.* died leaving *E.* his Executor; *D.* the Legatee of the 500 *l.* brought his Bill for his Legacy; upon which Lord *Harcourt* decreed, that as to ſo much of the perſonal Eſtate as was exhauſted by the Bond-Debt, the Legatee of the 500 *l.* ſhould ſtand in the Place of the Bond-Creditor againſt the Land, and that the Freehold Eſtate ſhould be liable, in Default of perſonal Aſſets, to pay the Legacy.

From this Decree the Deviſee of the Freehold Lands now appealed to the Lord *Parker*, inſiſting that the 500 *l.* Legacy being by the Will charged on the Copyhold Eſtate, and that Fund failing for want of a Surrender, the Freehold Eſtate which was expreſly deviſed to another Perſon ought not to be liable, and that the Land being ſpecifically deviſed, was not chargeable with a general pecuniary Legacy.

Lord *Parker*, having taken Time to conſider of it, reverſed that Part of the Decree whereby the Freehold Eſtate was ſubjected to the Legacy; obſerving 1*ſt*, That tho' Equity will marſhal Aſſets in Favour of a Legatee, as well as of a Simple Contract Creditor, yet every Deviſee of Land is as a ſpecific Legatee, and ſhall not be broken in upon, or made to contribute towards a pecuniary Legacy.

2*dly*, That it was a Rule, if one gives a ſpecific Legacy of a Horſe, or Diamond, and alſo a pecuniary Legacy of 500 *l.* to *B.* and there are not Aſſets to pay both, ſtill the ſpecific Legatee ſhall be preferred and have his whole Legacy; for were the Executor to make him contribute towards the pecuniary Legacy, this would be, *pro tanto*, to make ſuch ſpecific Legatee buy his Legacy, againſt the manifeſt Intention of the Teſtator.

3*dly*, That if a ſpecific perſonal Legatee ſhall not contribute towards a pecuniary Legacy, much leſs ſhall a ſpecific Deviſee of Land.

4*thly*, That if in the principal Caſe the Teſtator had deviſed the 500 *l.* to *A.* and a Term of 500 Years to *B.* without leaving Aſſets to pay the 500 *l.* ſtill the ſpecific Legatee of the Leaſe ought to prevail, without contributing towards the pecuniary Legacy; and if ſuch pecuniary Legatee ſhall not break in upon a ſpecific Legatee of a Term, *a fortiori* ſhall he not diſappoint the Will as to a Deviſe in Fee, which is more to be favoured than a Deviſe of a Term, in regard it is with more Difficulty that a Court of Equity, in any Caſe, breaks in upon, or charges, a real Eſtate.

5*thly*, That this Caſe was ſtill ſtronger, where the Teſtator had appointed a Fund for the Payment of the Legacies, *viz.* the Copyhold; and tho' that had failed for want of a Surrender, the Conſequence would be, that the Fund failing, the Legacy muſt fail alſo. Indeed the Bond Creditor might elect to have his Debt out of the Aſſets in the Hands of the Heir, or of the Deviſee, but in ſuch Caſe the Heir or Deviſee ſhould have this Relief, *viz.* to ſtand in the Place of the Bond Creditor, and re-imburſe himſelf out of the perſonal Eſtate.

6*thly*, But tho' Equity would thus marſhal the Application of Aſſets, yet would it not do this to diſappoint the Will of the Teſtator, by breaking in upon the Deviſe of the Freehold which the Teſtator did not intend to charge, but on the contrary ſhewed his Deſign to charge the Copyhold Eſtate therewith.

And *note*, That the decretal Order in the Caſe of (*a*) *Hern* verſus *Merrick* was produced, whereby it appear'd, that Lord *Harcourt* did not then determine this Point, but reſerved it for farther Conſideration.

(*a*) Vide ante 201, 204.

Hartop verſus *Whitmore*.

Caſe 196.

Lord Chancellor Parker.

ONE by Will gives his Daughter a Portion of 500 *l.* afterwards the Father marries the Daughter and gives her 300 *l.* for her Portion, and lives four Years after the Marriage of his Daughter, without revoking his Will.

One deviſes to his Daughter a Portion of 500 *l.* and afterwards in his Life-time gives her 300 *l.* for her Portion in Marriage, and four Years after dies without revoking the Will; the Husband is a Bankrupt; the Aſſignees not intitled to the 500 *l.* Legacy, nor any Part thereof.

The Husband of the Daughter becoming a Bankrupt, the Aſſignees under the Commiſſion bring a Bill againſt the Executor of the Father for the 500 *l.* inſiſting, that though the Father had given to his Daughter a Portion, yet he might give her a Legacy alſo, as well as a Portion; and in this Caſe it was to be the rather intended that the Teſtator deſigned his Daughter ſhould have both, becauſe the Portion was leſs than the Legacy. Like the Caſe where a Debtor gives a Legacy to his Creditor which is leſs than the Debt owing to the Legatee, this was never held to go in Part of Satisfaction of the Debt; and what made the principal Caſe ſtill ſtronger was, that the Teſtator ſurvived the Marriage of his Daughter four Years, and all that while never thought proper to revoke his Will, which in all Preſumption he would have done, if he had not intended his Daughter ſhould have had both the

Portion and the Legacy. It was likewiſe obſerv'd, that by the Statute of Frauds a Will in Writing could not be revoked without Writing; wherefore at leaſt the Plaintiff ought to recover 200 *l.* to make up the Portion tantamount to the 500 *l.* Legacy.

Lord Chancellor, with great Clearneſs: If a Father gives a Daughter a Portion by his Will, and afterwards gives to the ſame Daughter a Portion in Marriage, this, by the Laws of all other Nations as well as of *Great Britain*, is a Revocation of the Portion given by the Will; for it will not be intended, unleſs proved, that the Father deſigned two Portions to one Child; and as to the Objection of his having lived ſo long after giving the Portion to his Child on her Marriage, without ever revoking that Part of his Will, there could be no Need for the Father to revoke that Legacy which he before had done by giving the Portion in his Life-Time, ſince that would be but revoking the ſame Will twice. And this Demand is the harder, inaſmuch as it is made by the Aſſignees of the Commiſſioners of Bankruptcy againſt the Husband; ſo that the Wife whoſe Portion this is ſaid to be, would be never the better for it.

Diſmiſs the Bill with Coſts.

Caſe 197.

Lord Chancellor Parker.

Heath verſus *Percival*.

A. and *B.* Partners in a Goldſmith's Trade are bound in a Bond to *J. S.* *A.* and *B.* break off the Partnerſhip and divide their Stock; *J. S.* the Obligee in the Bond knows this, and that *A.* took upon him to pay the Debts, and after a great Diſtance of Time brings a Bill againſt the Executors of *B.* yet he (*J. S.*) ſhall recover.

SIR *Stephen Evans* the Goldſmith and his Partner *Percival*, were bound in a Bond to the Plaintiff for the Payment of 1000 *l.* and Intereſt, and this ſo long ſince as 1693, in which Year the Money was employed in the Partnerſhip Trade. In the ſame Year *Percival* being very ill in Health they broke off Partnerſhip, when Sir *Stephen Evans*, by ready Money and his own Bond, ſecured to *Percival* his Share of the Partnerſhip Stock, and took upon himſelf all the Partnerſhip Debts, giving his Covenant to ſecure *Percival* from all ſuch Debts: The ſame Year *Percival* died, leaving one *Samuel Percival* his Executor, and the Defendant his reſiduary Legatee.

Publick Notice was given to all the Creditors of the Joint-Stock, that they were either to receive their Money, or to look on Sir *Stephen Evans* only as their Pay-Maſter.

In 1708 the Plaintiff *Heath* came to Sir *Stephen* and called in his Money, but then continued it upon Sir *Stephen*'s ſubſcribing the Bond at 6 *l. per Cent*. Sir *Stephen* continued ſolvent until 1711, and the Plaintiff till that Time, might, when he pleaſed, have had his Money. The Plaintiff outlawed *Samuel Percival* the Executor, and brought this Bill againſt the Defendant *Peter Percival* the Reſiduary Legatee, to recover the 1000 *l.* and Intereſt out of the Aſſets of *Percival* the Co-partner, Sir *Stephen Evans* having in 1711 become a Bankrupt and inſolvent.

Obj. This is not a proper Cauſe for the Plaintiff to come for Relief in Equity, when he has put an Hardſhip on the Defendant; he might have had his Money for the Space of Years, during all which Time Sir *Stephen* was in full Credit, but for the Gain of 6 *l. per Cent.* he has continued his Debt in Sir *Stephen*'s Hand, after which Length of Time, and when the Defendant has accounted with Sir *Stephen*, delivered up all his Vouchers, given a general Releaſe, and can have no Remedy againſt Sir *Stephen* (he being a Bankrupt:) now the Plaintiff comes for Aid in Equity againſt him on this Bond, all which is made ſtill harder on the Defendant's Part, as he was in other Reſpects a great Loſer by Sir *Stephen*'s Bankruptcy.

Laſtly, It was ſaid that the Plaintiff's altering the Intereſt on the Bond from 5 *l.* to 6 *l. per Cent.* was an Alteration of the Security, and conſequently the Defendant no longer liable.

Lord Chancellor: The Defendant's Teſtator being bound in the Bond, he muſt lie at Stake until the Bond be paid, and though the Plaintiff continued the Money on the Bond, this was not material, ſince it was upon the Credit of both the Obligors. As to the Notice given by Sir *Stephen* to the Joint Creditors to bring in their Securities, and that Sir *Stephen* alone would be hereafter liable, that being *Res inter alios acta* could not bind the Plaintiff; and his changing the Intereſt did not alter the Security, for ſtill it was the Bond of both, but the Defendant could not be liable to more than 5 *l. per Cent.* for the Arrear of Intereſt.

Whereupon the Plaintiff had a Decree for his Debt, Intereſt and Coſts.

Where an Executor in Truſt was outlawed, and a Witneſs proved he had inquired after, and could not find him, not neceſſary to make him a Party.

Note; In this Caſe the Executor in Truſt was outlawed, and a Witneſs proved that he had inquired after, but could not find him, which was thought to be a full Anſwer to the Objection that ſuch Executor was not made a Party.

DE

Term. S. Hillarii,

1720.

Throgmorton verſus *Church*. In Domo Procerum.

Caſe 198.

Suing the Bail below pending a Writ of Error in Parliament, is a Contempt and Breach of Privilege.

IN Debt on Eſcape brought by *Church* againſt *Throgmorton* Sheriff of *Bucks*, *Church* the Plaintiff in *C. B.* had a Verdict and Judgment, whereupon the Defendant *Throgmorton* brought Error in *B. R.* and one *Mead*, an Attorney of *Ayleſbury* was his Bail, but Judgment being there affirmed, Error was brought in the Houſe of Lords, and pending the Writ of Error there, *Church* the Plaintiff below took out Execution againſt *Mead* the Bail, and ſeiſed all his Goods upon a *Fi. Fa. Mead* petitioned the Houſe of Lords againſt the Attorney that took out this Execution, alledging it to be a Contempt and Breach of Privilege; whereupon Counſel were heard before the Committee of Privileges, and objected that this was no Breach of Privilege or Contempt; becauſe the Writ of Error in the Houſe of Lords only ſtaid all Proceedings upon the Record of the Judgment againſt the Principal; whereas the Recognizance given by the Bail was a diſtinct Record; and if it had been intended to ſtay Proceedings againſt them upon this Record, they muſt alſo bring their Writ of Error in Parliament; it was compared to the Caſe of two bound in a Bond jointly and ſeverally for the ſame Debt, in which Judgment is firſt had againſt one, and afterwards, in another Action, Judgment is alſo obtained againſt the other Obligor who brings Error, ſtill the former Obligor may be ſued upon the Judgment againſt him, tho' it be but one Debt; and if this was a Contempt here, or if Matters were ſtaid by Means of the Writ of Error brought by the Defendant in the original Action, then Reſtitution ought to be made in *C. B.* where the *Fi. Fa.* was taken out, and the Goods ſeiſed; whereas this had been attempted, and been ſpoke to by Counſel before the Judges of *C. B.* to whom Complaint had been made of this as of an irregular Execution; but they held it to be regular, (as Mr. Juſtice *Tracey* himſelf informed me.)

On the other Side it was inſiſted, this was a Contempt; that if Execution had been taken out againſt the Plaintiff in Error, pending the Writ of Error in the Houſe of Lords, it had been plainly a Contempt, and in the preſent Caſe they had in Effect been doing the ſame Thing, by taking the very Debt in Queſtion out of the Pockets of the Bail, which could amount to no leſs than to a taking it from the Principal, who (at leaſt by an implied Promiſe of Law) was liable and compellable to indemnify the Bail; that the Writ of Error moſt plainly ſuſpended the original Plaintiff's Right to the Debt, it being thereby *ſub judice* whether there was any Debt or not; and it was unreaſonable that the Plaintiff below ſhould be allowed to take out Execution for a Debt, before it was determined whether there was any ſuch Debt; for in Caſe the Judgment ſhould be reverſed, the Plaintiff below ought not to have Execution thereon; and if the Principal was diſcharged of the Debt, the Bail muſt be ſo too, who could only be liable, in Reſpect of the Debt incurred by his Principal; and therefore it was abſurd to ſuppoſe the latter to be in a worſe Condition than the former.

Whereupon it was *reſolved*, that this was a Contempt and Breach of Privilege, and the Plaintiff's Attorney ordered to make a Reſtitution of the Goods, which was accordingly done; but the Lords, being informed that the Judges held it no Contempt at Law, ſpared the Coſts in this Caſe as to the Attorney who ſued out the Execution, upon his returning to *Mead* the Bail, all the Goods he had taken from him.

Debt againſt the Sheriff for an Eſcape of one in Execution on an Outlawry after Judgment, may be brought either in the *Tam quam*, or at the Suit of the Party only.

Afterwards the Writ of Error itſelf came to be argued; where the only Point inſiſted upon for the Plaintiff in Error was, that this Action of Debt on the Eſcape againſt the Defendant the Sheriff, was when the Defendant in the original Action in *C. B.* had been outlawed upon an Outlawry after Judgment, and ſuch Defendant had upon this Judgment been taken in Execution, the Sheriff had let him eſcape, for which the Action was brought againſt him, and a Verdict and Judgment obtained. Under theſe Circumſtances it was ſaid, that the Action being brought for this Eſcape on an Outlawry after Judgment, ought to have been brought in the *Tam quam*, (*viz.*) *Tam pro Domino Rege, quam pro ſeipſo*; and I being of Counſel in the Houſe of Lords for the Plaintiff in Error, argued as follows:

One *Joan Church* (the Plaintiff in the original Action and Defendant in Error) had recovered Judgment in Debt in *C. B.* againſt one *John Merridale* for 21 *l.* and after Judgment, *Church* (the Plaintiff below) outlawed this *Merridale*, and ſued out a ſpecial *Capias utlagatum* againſt his Body, Lands and Goods, directed to the Defendant, then Sheriff of the County of *Bucks*.

As to Lands or Goods *Merridale* had none; and as to his Body, the Defendant took that in Execution upon the *Capias utlagatum*; but it was a Body (one would think) ſcarce worth taking, being quite worn down with Age, near eighty Years old, and almoſt ſtarved with Poverty. It ſeems the Sheriff (a Thing in a poor Man's Caſe not very uſual) had Compaſſion for him, and ſhewed him ſome Favour, for which the now Defendant *Church* hath brought Debt for an Eſcape againſt the Sheriff, and had the good Luck to obtain a Verdict and Judgment thereupon in *C. B.* for 131 *l.* being the whole Debt, and on Error brought in *B. R.* that Judgment was (without Argument) affirmed.

To reverſe theſe two Judgments is this Writ of Error now brought before your Lordſhips. It being after a Verdict, I ſhall forbear to mention the ſeveral Miſtakes in the Declaration, for being ſo in Form only, I doubt they are cured by the Verdict; but I apprehend there is a Miſtake in Subſtance, I mean, as to the Nature of the Action brought in the Plaintiff's Name only, whereas it ought to have been as well on Behalf of the King, as the Plaintiff, *tam pro Domino Rege, quam pro ſeipſo.* It appears by the Declaration, that *Merridale* was outlawed after Judgment, that he was taken upon a *Capias utlagatum*, and that while he was in Cuſtody upon this *Capias*, the Sheriff let him eſcape. Now by the Party's being outlawed, all his perſonal Eſtate and the Profits of his Lands are forfeited to the King; and the Writ of *Capias utlagatum* is a Writ at the King's Suit; upon which when the Sheriff has taken the Party, he is the King's Priſoner as well as the Plaintiff's; and when the Sheriff lets him eſcape, it is a Contempt to the King, and a Wrong to him as well as to the Plaintiff; therefore this Action for the Eſcape ought to be at the Suit of the King as well as the Party, which is agreeable to the Reaſon of the Law, and likewiſe to the Precedents.

If the Priſoner taken in Execution upon a *Capias utlagatum* be the King's Priſoner as well as the Party's, (as plainly he is) it ſeems reaſonable, that for the Eſcape of ſuch Priſoner, the Action ſhould be brought as well on Behalf of the King as of the Plaintiff.

1*ſt*, For that by this Eſcape the King as well as the Plaintiff loſes his Priſoner; and if the Sheriff's permitting his Priſoner taken upon this *Capias utlagatum* to eſcape be a Wrong to the King as well as to the Plaintiff, then it is reaſonable that the Action brought for this Wrong ſhould be on Behalf of the King as well as the Plaintiff.

2*dly*, As the Sheriff's ſuffering the Priſoner to eſcape is a Contempt to the King as well as a Damage to the Party, it is proper that the Action be as well *pro Domino Rege, quam pro ſeipſo*.

3*dly*, As the Writ of *Capias utlagatum* is at the King's Suit, ſo it is proper, for Conformity's Sake, that the Action for the Eſcape grounded upon it be on the King's Behalf as well as on the Party's.

In former Times it was ſo far from being doubted whether ſuch Action for an Eſcape of a Priſoner taken on a *Capias utlagatum* ſhould not be brought as well on Behalf of the King as of the Party, that, on the contrary, it was a Doubt whether the Plaintiff in ſuch Caſe could have any Action at all in his own Name. I ſay, it was formerly queſtioned, where a Defendant was taken upon a *Capias utlagatum*, and the Sheriff let the Defendant eſcape before ſuch Time as the Plaintiff had entered any Prayer, or elected that the Defendant ſhould be in Execution at his Suit, whether in ſuch Caſe the Plaintiff could bring an Action for the Eſcape of ſuch Priſoner, in Regard it was both the King's Suit and the King's Priſoner; and (I think) *Garnon*'s Caſe, 5 *Co.* 88. was the firſt wherein it was reſolved, that the Plaintiff might have ſuch Action againſt the Sheriff upon the Eſcape of one taken on a *Capias utlagatum*; but ſtill it muſt be intended that the Action be brought as well on Behalf of the King as of the Party. I muſt admit, that as this Action upon which the Outlawry is grounded, was at the Suit of the Party, as it is carried on at the Charge of the Party, as the King receives Advantage from it, being by that Means intitled to the Forfeitures accruing by Outlawry: So the Party is to receive ſome Benefit by the Suit of the King, and therefore is to be firſt paid his Debt out of the Goods and Chattels of the Defendant who is outlawed. But even this has been held by very learned Men to be at firſt *ex* (*a*) *gratiâ Regis*, and not *de jure*, *Vide Yelv.* 19. by *Popham* Chief Juſtice. Neither can it be objected, that it is not neceſſary the Action ſhould be brought on Behalf of the King as well as the Party, becauſe the latter is to recover Damages; for,

(*a*) Vide 2 Vol. 270. the ſame ſaid by Lord Commiſſioner *Gilbert*.

There are many Caſes in the Law, where the Party is to recover all the Damages, and yet the Action muſt be brought *tam pro Domino Rege, quam pro ſeipſo*. Thus in an Action of (*b*) *Scandalum magnatum* for ſpeaking ſcandalous Words of a Peer of the Realm, or of any of the great Officers of this Kingdom, the Action is to be brought *tam pro Domino Rege, quam pro ſeipſo*, and yet the Party in this Caſe recovers all the Damages. So in an Action againſt the Hundred upon the Statute of (*c*) *Hue and Cry* for a Robbery, tho' the Party Plaintiff recovers all the Damages, yet is the Action to be brought as well on Behalf of the King as of the Party. In *Cro. Jac.* 134. *Waterhouſe* verſus *Bawde*, it is laid down as a Rule by the Court, " That where a Statute pro-" hibits

(*b*) 2 Rich. 2. c. 5. 12 Rich. 2. c. 11.

(*c*) 13 Ed. 1. c. 1. 27 Eliz. c. 13.

" hibits a Thing and adds no Penalty, an Action " lies againſt the Party for acting contrary to the " Prohibition of the Statute, but that it ought to be " *tam pro Domino Rege, quam pro ſeipſo,* becauſe in ſuch " Caſe the King is to have a Fine." And if it be a Reaſon why the Action ought to be *tam pro Domino Rege, quam pro ſeipſo,* in Caſe where the King is intitled to a Fine, then ſuch Rule muſt hold in the preſent one; for here it is a Contempt in the Sheriff, who has taken the Defendant upon a *Capias utlagatum,* to permit him to eſcape, he being the King's Priſoner, and taken at the King's Suit, for which Contempt the Sheriff is liable to be fined.

Thus according to the Reaſon of the Law, this Action ought to be brought *tam pro Domino Rege, quam pro ſeipſo*; nay, the Caſe ſeems to be within all thoſe Reaſons which require ſuch an Action.

And now as to Precedents, I ſhall cite only two, but thoſe ſuch as did not paſs *ſub ſilentio,* being adjudged on the very Point, where upon a Defendant's being taken on a *Capias utlagatum,* and the Sheriff's ſuffering him to eſcape, an Action was brought againſt the Sheriff *tam pro Domino Rege, quam pro ſeipſo,* for that Eſcape: To which it was objected, that the Action ought to be only in the Name of the Party: But the Objection was over-ruled, and the Action adjudged to be rightly brought, foraſmuch as the *Capias utlagatum* was the King's Writ, iſſued out at his Suit, and the King to have the Benefit thereof as well as the Party. *Cro. Jac.* 533. *Parkhurſt* verſus *Powel.* The other Authority where it was ſo adjudged upon the like Debate, is in 1 *Roll. Rep.* 78. *Barret* verſus *Winſcomb,* and *Cro. Car.* 360.

In the next Place, your Lordſhips will give me Leave to obſerve, that the Action is in its Nature a pretty hard one, (*viz.*) to charge one Man with the Debt of another, to make the Sheriff reſponſible for the Debt of his Priſoner. Indeed there was a Time when the Law in this Point was much more unreaſonable than it now is, when it was held, (and for a long Time it was ſo held) that where the Sheriff had ſuffered one in Execution to eſcape, the Plaintiff, who by his having once taken the Defendant in Execution was at the End of his Suit, could not * retake him, tho' *ſuffered* by the Sheriff to eſcape: But ſince the Law is now conſtrued to be otherwiſe, and the Plaintiff may again take the Defendant in Execution, unleſs he himſelf conſented that his Priſoner ſhould eſcape; it ſeems pretty hard that in all Events, when the Sheriff ſuffers the Priſoner to eſcape, he ſhould be charged with the whole Debt; and it is ſo much the harder in this Caſe, where the Priſoner had no Eſtate either real or perſonal, was quite worn down with Age, and almoſt ſtarved with Poverty; beſides that he died within a few Days after the pretended Eſcape, and had he died in Priſon, the Plaintiff would not have had the leaſt Advantage.

The Plaintiff below has been ſo much in Haſte to carve out Satisfaction for himſelf, that he would not vouchſafe to ſtay for the Juſtice of this Houſe, but proceeded againſt the Bail below, and took his Goods in Execution, even pending the Writ of Error in Parliament, which your Lordſhips, with great Juſtice, reſolved to be a Contempt and Breach of Privilege of this Houſe; notwithſtanding which, the Plaintiff has not thought fit to make the Bail any Satisfaction for the great Coſts and Damage which he put him to by this erroneous Execution.

Upon the whole, we humbly inſiſt, that this Action for the Eſcape of the Priſoner taken upon a *Capias utlagatum* ought to be *tam pro Domino Rege, quam pro ſe-ipſo*, 1*ſt*, becauſe the Priſoner that is ſuffered to eſcape is the

---

* Vide Hob. 202. Denied to be Law, 1 Vent. 4, 269.

the King's Priſoner; 2*dly*, Becauſe by the Sheriff's permitting the Priſoner to eſcape, the King is damnified as well as the Party; 3*dly*, As by Reaſon of the Sheriff's ſuffering this Eſcape, there is a Contempt to the King, as well as an Injury to the Party; 4*thly*, For that by this Eſcape the Sheriff is liable to anſwer, as well a Fine to the King, as the Debt to the Party; 5*thly*, This Caſe is within all thoſe Reaſons that require an Action to be brought *tam pro Domino Rege*, *quam pro ſeipſo*; and *laſtly*, Upon the Strength of the Authorities which have been cited to your Lordſhips, we hope that this Action for the Eſcape, becauſe not brought as well on Behalf of the King, as of the Party, is erroneous, and that therefore the Judgment ought to be reverſed.

But on Debate the Judgment was affirmed, and chiefly on the Authority of the Caſe of *Moore* verſus Sir *George Reynolds*, *Cro. Jac.* 619, 620. where in an Action for an Eſcape of a Priſoner who had been taken on a *Capias utlagatum* after Judgment, and the Action being brought at the Suit of the Party only, it was objected that it ought to have been in the *tam quam*; but in that Caſe the Prothonotaries certifying that the Precedents had been both Ways, the Objection was diſallowed.

Oneal verſus *Mead*.

Caſe 199.

At the Rolls.

One having mortgaged his Fee-ſimple Eſtate, deviſes his Leaſehold to *A*. and his Fee-ſimple to *B*. and dies, leaving no other Perſonal Eſtate. The Deviſee of the Fee ſimple muſt take it *cum onere*, and ſhall not charge the Leaſehold Eſtate ſpecifically deviſed with the Mortgage.

ONE ſeiſed of a Real Eſtate in Fee, which he had mortgaged for 500 *l*. and poſſeſſed of a Leaſehold, deviſed the former to his eldeſt Son in Fee, and gave the latter to his Wife, and died, leaving Debts which would exhauſt all his perſonal Eſtate, except the Leaſehold given to his Wife.

The Queſtion was, Whether there being (as uſual) a Covenant to pay the Mortgage Monies, the Leaſehold Premiſſes deviſed to the Wife ſhould be liable to diſcharge the Mortgage?

Obj. The Perſonal Eſtate is the natural Fund for Debts, and according to the Decree made by his *Honour* in Sir *Peter Soame*'s Caſe, where the Father the Mortgagor dying inteſtate, and leaving a Mortgage upon his real Eſtate made by himſelf, the Perſonal Eſtate was applied to pay off the Mortgage, whereby the younger Children were left deſtitute: So by the ſame Reaſon, in this Caſe, the Leaſehold, though ſpecifically deviſed to the Wife, yet being Perſonal Eſtate, muſt be liable to pay the Debt due by the Mortgage; eſpecially in Favour of the Heir, who otherwiſe would be very ſlenderly provided for, and in a worſe Condition than his younger Brothers.

But the *Maſter of the Rolls*, after taking Time to conſider of it, and being attended with Precedents, decreed that as the Teſtator had charged his real Eſtate by this Mortgage, and on the other Hand ſpecifically bequeathed the Leaſehold to his Wife, the Heir ſhould not diſappoint her Legacy by laying the Mortgage Debt upon it, as he might have done, had it not been ſpecifically deviſed; and though the mortgaged Premiſſes were alſo ſpecifically given to the Heir, yet he to whom they were thus deviſed muſt take them *cum Onere*, as probably they were intended. That by ſuch Conſtruction (*a*) each Deviſe would take Effect, (*viz.*) the Leaſehold Eſtate go to the Deviſee thereof, and the Heir enjoy the Freehold, though ſubject to the Burden with which the Teſtator in his Life-Time had charged it; and this Reſolution did not in the leaſt interfere with that of *Cliſton* and *Birt* (*b*), becauſe in the latter there was no Mortgage.

(*a*) See the Caſe of *Long* verſus *Short*, ante 403.

(*b*) Ante 678.

DE

Term. Paſchæ,

1721.

Holditch verſus *Miſt*.

Caſe 200.
Lord Chancellor Parker.

One of the late Directors of the *South-Sea* Company owes Money which is recovered againſt him at Law; tho' all his Eſtate is taken from him by the late Act, and Proviſion made for his Creditors, yet the Court denied an Injunction.

THE Plaintiff having been one of the late Directors of the *South-Sea* Company, was ſued at Law for 800 *l.* he having taken that Sum of the Defendant for 400 *l.* *South-Sea* Stock, which he had (as he affirmed) put into the Subſcription Books in the Name of one Mrs. *Peck*, whereas upon Search in all the Books it did not appear that there was any Sum whatſoever ſet down in the Name of *Peck*; upon which the Defendant *Miſt* brought an Action againſt the Plaintiff, as for ſo much Money received for the Defendant's Uſe, and obtained a Verdict. The Defendant at Law now brought his Bill, and moved for an Injunction, urging that in Regard the late (*a*) Act had veſted all his Eſtate in the Truſtees for the *South-Sea* Company, and made a Proviſion for the Payment of his Debts (being late a Director) out of his Eſtate, the Defendant *Miſt* ought to repair to the Truſtees; that it would be extremely hard to permit the Plaintiff at Law to take out Execution againſt the Body of his Debtor, when the Legiſlature had diſabled him from paying any of his Debts, and provided another Method for that Purpoſe;

(*a*) 7 Geo. 1. c. 27.

Purpoſe; that it was like the Caſe of a Bankrupt, where the Court had not only granted an Injunction, but alſo releaſed the Bankrupt, who, after having given up all his Eſtate, and ſubmitted to be examined, had yet been arreſted by a peeviſh Creditor.

Vide *Ex parte James* ante 610.

But the *Lord Chancellor* refuſed to grant an Injunction, ſaying, there was nothing of this Act of Parliament diſcloſed in the Pleadings; or if there was, yet that the Act was not made in Favour of the late Directors. However afterwards by Conſent, the preſent Truſtees of the *South-Sea* Company paid the Debt in Queſtion, out of the Allowance made by the Act to the Plaintiff *Holditch*.

Caſe 201.

Lord Chancellor Parker.

Mr. Phipps (Son of Sir Conſtantine Phipps) verſus *Earl of Angleſea.*

A general Act of Pardon, though with an Exception of Contempts, extends to pardon Contempts in marrying Infant Wards of a Court of Equity.

(*a*) Vide 2 Vol. 88, in *Wallis* ver. *Brightwell*, 89.

THE Plaintiff married the only Daughter of the late Earl of *Angleſea*, to whom by the Marriage Settlement and the Will of her Father, 15000 *l.* was ſecured, (*viz.*) 12000 *l.* by the Settlement, and 3000 *l.* by the Will, payable at her Age of eighteen or Marriage. The whole was charged on the late Earl's *Iriſh* Eſtate; but the Settlement and Will being made in *England*, and all Parties living here, the Money was decreed to be paid into Court with *Engliſh* Intereſt, (*a*) and without deducting the Charge of the Return from *Ireland*.

But the Plaintiff having married the young Lady, without the Privity of the Committee the Lady *Elizabeth Gayer*, to whom ſhe had been committed by Order of Court, the *Lord Chancellor* declared, that this did very nearly touch the Honour and Juſtice of the Court, and obſerved how very unequal the Laws of the Land were in making it Felony to ſteal my Horſe, and not Felony to inveigle and gain my Daughter without my Conſent; wherefore he ordered all Parties to be examined upon Interrogatories touching the Manner of gaining the Marriage, and Notice of the Order of Commitment.

However the general (*a*) Act of Pardon coming afterwards, tho' with an Exception "Of all Contempts "and Offences for which any Proſecution was then de-"pending, and which had been proſecuted at the Charge "of any private Perſon or Perſons:"

Per Cur'. This Offence or Contempt ending only in the Puniſhment of the Party offending, and not in relieving or redreſſing the Proſecutor, is pardoned.

Memorandum, The *Lord Chancellor* made the like Determination in the Cauſe of *Kiffin* verſus *Kiffin,* where a young Infant Girl of great Fortune was committed to the Care of a Tradeſman in *London,* a Linnen-Draper, after which a younger Son of the Committee married her, and a Woman who had been one of the moſt active Inſtruments in bringing about this Marriage, being big with Child, and near her Time, the Hearing of the Complaint was put off until ſuch Perſon was brought to Bed, and in the mean Time came out an Act of general Pardon, which was held to extend to this Offence. So in Dr. *Talden*'s Caſe (who was ſuſpected to have encouraged the Infant Duke of *Beaufort*'s going from his Committees the Dukes of *Grafton* and *Portland,* under whoſe Care he had been placed by the Court of Chancery) this Offence or Contempt was likewiſe held to be pardoned by the ſame Act.

(*a*) 7 Geo. 1, cap. 29. § 23.

Caſe 202.

Lord Chancellor Parker.

Committee of an Infant Heireſs having given a Recognizance conditioned that he ſhould not ſuffer the Infant to marry without the Conſent of the Court; the Form of this Recognizance moderated, *viz. That the Infant ſhall not marry with the Committee's Privity without the Conſent of the Court.*

(*a*) See the Caſe of *Judge Eyre* verſus *Lord Shaftsbury*, 2 Vol. 102.

Doctor Davis's Caſe.

AN Infant Heireſs was committed to the Cuſtody of Dr. *Davis*, who was a Perſon of a very good Eſtate, and the Courſe of the Court being that ſuch Committee ſhall enter into a (*a*) Recognizance with two Surities, conditioned that he *ſhould not permit or ſuffer the Infant to marry without the Conſent of the Court*; Dr. *Davis* had been already indulged ſo far, as that the Court ordered his own ſingle Recognizance to be taken without Sureties; and now the Doctor petitioning that the Recognizance might be made different from the common Courſe, (*viz.*) to be bound that the Infant Heireſs ſhould not with the *Conſent, Privity, or Connivance of the Doctor* be married to any Perſon without the Conſent of the Court; it was urged to be unreaſonable that the Recognizance ſhould be otherwiſe penned, or that an honeſt Committee ſhould be liable to the Forfeiture of his Recognizance, or be undone, if a raſh Infant would without the Privity of his Guardian ſteal a Marriage; for at this Rate a Guardian, without any Default in him, might forfeit his Recognizance; and as the Court would not in ſuch Caſe order the Recognizance to be ſued, ſo to encourage an honeſt Guardian to act, it would be but juſt to have this explained in Manner as deſired; eſpecially as the Petitioner in the preſent Caſe was a Gentleman of a very good Character and Eſtate.

Mr. *Talbot contra*: The Courſe is to enter into a Recognizance not to ſuffer the Infant to marry without the Conſent of the Court; and if the Ward, without the Privity or Default of the Guardian, ſteals a Match, the Committee is ſafe in the Juſtice of the Court from having his Recognizance put in Suit; ſo that the Doctor is now miſtruſting the Juſtice of the Court, whoſe ſettled Forms are not to be altered to pleaſe the Humour of any Perſon; beſides if the Forms are to be altered in Favour of Doctor *Davis*, they muſt by the ſame Reaſon be liable to be altered at the Requeſt of any other Committee. With Reſpect to the Doctor's Character, ſurely every Committee is taken by the Court to be a fair and honeſt Man, otherwiſe it would hardly have intruſted him with the Guardianſhip: But farther, as this is the conſtant Form of Recognizances in ſuch Caſes, ſo is it founded on good Reaſon, ſince it might be very difficult to prove that the Committee was privy or conſenting to the Marriage, though in Fact he really were ſo.

Forms of the Court not to be altered to gratify a capricious Humour.

Lord Chancellor: I would be very tender of altering the ſettled Forms of the Court to ſatisfy a capricious Humour; but this Caſe differing in its Circumſtances from the common one, and as I allowed the Alteration of the Form of the Recognizance in Favour of Mr. *Lacy*, to whom I lately committed an Infant Heireſs, ſo let this be altered in the ſame Manner, (*viz.*) That the Infant ſhall not be married without Leave of the Court, by the Conſent, Privity or Connivance of the Committee.

DE
Term. S. Trinitatis,
1721.

Caſe 203.
Lord Chancellor Macclesfield.

Bagwell verſus *Dry.*

One deviſes the Surplus of his Perſonal Eſtate to four equally, and leaves *J. S.* Executor in Truſt. One of the four dies in the Life of the Teſtator; his Share, as ſo much of the Teſtator's Eſtate undiſpoſed of by the Will, ſhall go according to the Statute of Diſtribution.

J. S. inter al' bequeathed the Surplus of his Perſonal Eſtate unto four Perſons equally to be divided between them Share and Share alike, and made *A. B.* his Executor in Truſt. One of the four Reſiduary Legatees died in the Life of the Teſtator, after which the Teſtator died; and the Queſtion being, to whom the fourth Part deviſed to the Reſiduary Legatee (who died in the Life of the Teſtator) ſhould belong?

The *Lord Chancellor*, after Time taken to conſider of it, did this Day deliver his Opinion, That the Teſtator having deviſed his *Reſiduum* in Fourths, and one of the Reſiduary Legatees dying in his Life-Time, the Deviſe of that fourth Part became void, and was as ſo much of the Teſtator's Eſtate (*a*) undiſpoſed of by the Will; that it could not go to the ſurviving Reſiduary Legatees, becauſe each of them had but a Fourth deviſed to them in common, and the Death of the fourth Reſiduary Legatee could not avail them, as it would

(*a*) See the Caſe of Lord *Bindon* verſus *Earl of Suffolk*, ante 96.

would have done, had they been all joint Legatees, for then the Share of the Legatee dying in the Life of the Teſtator, would have gone to the Survivors. (*a*) But here the *Reſiduum* being deviſed in Common, it was the ſame as if a fourth Part had been deviſed to each of the four, which could not be increaſed by the Death of any of them.

(*a*) Show. 91. Salk. 238.

His Lordſhip farther declared, that this Share could not go to the Executor, he being but a bare Executor in Truſt, and conſequently, that it muſt belong to the Teſtator's next of Kin, according to the Statute of Diſtribution, as ſo much of the Perſonal Eſtate remaining undiſpoſed of by the Will, and that as to this, the Executor was a Truſtee for ſuch next of Kin.*.

See the Caſe of *Page* verſus *Page*, 2 Vol. 489. the ſame Determination.

Lord Wenman's Caſe.

Caſe 204.

Lord Chancellor Parker.

Where the Husband was a Lunatick, the Wife, tho' and *Iriſh* Peereſs, committed for not producing him.

A Commiſſion was granted to enquire of the Ideocy or Lunacy of the Lord *Wenman*, and upon the Meeting of the Commiſſioners, they who had him in their Cuſtody were deſired to produce him, but being refuſed, the *Lord Chancellor* made an Order for the producing of Lord *Wenman*. Whereupon after great Delays, and after the Lady *Wenman* his Wife had been ordered to attend, and it alſo appearing by Affidavits, that ſhe had been with her Husband, and been inſtrumental in removing him from Place to Place, in Order to evade his being produced:

The *Lord Chancellor* ordered the Lady *Wenman* to be committed to the Fleet; ſaying it was great Imprudence, as well as Obſtinacy in her, not to do what ſhe could

---

* See this Caſe cited in *Farrington* and *Knightly*, Precedents in Chancery 567. But the Report there is not warranted by the Regiſter's Book.

for the producing her Husband, who upon the Affidavits that had been made, could not but be thought a Lunatick; for if he were found ſo, his Wife muſt have the Commitment of his Perſon, and alſo an Allowance made her ſuitable to the Eſtate and Greatneſs of his Quality; and it not being pretended that the Lord *Wenman* was an Ideot *a Nativitate*, his Eſtate muſt be all accounted for, and the Perſonal Eſtate would upon his Death without Children, go one Moiety thereof to her. That the taking of this Account would ſave the Eſtate from Imbezilment, to the Benefit of his Family, and where there was ſuch a Preſumption of Lunacy, the Wife, though otherwiſe under the Power of the Husband, might well be ſuppoſed to have him under her Power.

2*dly*, *His Lordſhip* obſerved, that it would be a Scandal to the Court, if this Matter, (*viz.*) the Contempt of not producing the Lord *Wenman*, were not puniſhed after ſo long Time given for that Purpoſe; alſo an Intolerable Hardſhip, if the Proſecutor of this Commiſſion, after ſo many Delays and ſo long an Expectation, ſhould be without Remedy; not to mention the Reflection it would bring on the Juſtice of the Court, which his Lordſhip ſaid ſhould not *die* in his Hands; and though he did this with great Reluctance, in Reſpect of the Quality of the Perſon whom he committed, yet ſince the Juſtice and Honour of the Court were ſo immediately concerned in this Matter, it was of abſolute Neceſſity.

Note; Afterwards a Jury, by Inquiſition found the Lord *Wenman* a Lunatick, and the Cuſtody of his Perſon was granted to his Wife, ſhe being diſcharged from her Commitment.

The Duke of Beaufort verſus *Berty.*

Caſe 205.
Lord Chancellor Macclesfield.
Guardians appointed by Will according to the Statute of 12 *Car.* 2. *cap.* 24. have no more Power than Guardians in Socage, and are but Truſtees, on whoſe Misbehaviour, or giving Occaſion of Suſpicion, the Court of Chancery will interpoſe.

THE late Duke of *Beaufort* by his Will appointed *James Berty* and *Doddington Grevill* Eſquires, Guardians of his two Sons, the preſent Duke and his younger Son the Lord *Noel Somerſet*; and upon a Petition by the Duke and Ducheſs of *Grafton*, and the Duke and Ducheſs of *Portland* (being near Relations of the preſent Duke of *Beaufort* and his Brother the Lord *Noel*, both Infants) praying that the Lord *Noel*, who at this Time went to *Weſtminſter* School, might be removed to *Eaton*, I objected, that the two Guardians being appointed ſo by the Will of the late Duke, until theſe noble Infants ſhould come to the Age of 21, were *in loco Parentis*, and had the Parental Authority delegated over to them by the Father's Will, who, by the Statute of 12 *Car.* 2. *cap.* 24. had as much Power to diſpoſe of the Guardianſhip of his Children, as by the Statute of 32 *H.* 8. a Man hath to diſpoſe of his Lands; that the two Guardians deſiring that the Lord *Noel* ſhould continue at *Weſtminſter* School, until he was fit to go from thence to the Univerſity; and this being alſo the Deſire of his Father the late Duke, it was ſubmitted, whether the Court would interpoſe in this Caſe. That indeed, formerly, when, Mr. *Grevill* one of the Guardians certified that he thought it proper, upon Lord *Noel*'s firſt coming to *Weſtminſter* School, and being much indiſpoſed in his Health, to remove him from thence, and while the two Guardians differed (the other Guardian Mr. *Berty* being againſt his Removal:) it was reaſonable that the Great * Seal, which has a Superintendency over all Infants, ſhould interpoſe; elſe there would be a Failure in the due Education of the Infant; but when both the Guardians had agreed that *Weſtminſter* School was the propereſt School for Lord *Noel*, it was hoped the Court would not ſend him to *Eaton*.

---

* One deviſed the Guardianſhip of his Child to his Wife and *A.* but if his Wife ſhould marry again, then the Wife and *A.* to fix upon another Guardian: The Wife did marry again, but would not agree with *A.* to chooſe another Guardian. Reſolved, that it devolved upon the Court of Chancery to appoint a Guardian. *Darcy* verſus *Lord Holderneſs*, *Trin.* 1725, by Lord *King*.

It was admitted, that in Caſe the Guardians ſhould misbehave, the Court might interpoſe, upon a Preſumption, that the Teſtator himſelf would not have intruſted the Guardians with this Power, had he foreſeen they would have abuſed it.

(*a*) See in the Caſe of *Frederick* verſus *Frederick*, 721.

Upon which Lord *Macclesfield*, with ſome Warmth ſaid, that the Guardians were (*a*) but Truſtees, and that the Statute, by enabling the Father to deviſe the Guardianſhip of his Children, did no more than impower the Father by Will to chuſe a different Perſon from him or her that would have been Guardian in Socage; a different Perſon than what the Law would have appointed, and to continue that Guardianſhip to a different Time than the Guardianſhip in Socage would have continued, (*viz.*) until twenty-one inſtead of fourteen. But that ſtill a Guardian appointed according to the Statute, had no more Power than a Guardian in Socage; and as the Court could interpoſe where there was a Guardian in Socage, ſo might it alſo do in a Caſe of a Guardian by the Statute, both being equally Truſtees; that ſuppoſe one ſhould deviſe Lands to Truſtees to ſell for ſuch a Price as they ſhould think fit, for Payment of Debts, there could be no Doubt but that this Court, at the Deſire of any ſingle Creditor might and would interpoſe, and order the Eſtate not to be ſold as the Truſtees ſhould think fit, but for the beſt Price before the Maſter; and as the Court would interpoſe, where the Eſtate of a Man was deviſed in Truſt, ſo would it *à fortiori* concern it ſelf, on the

Cuſtody of a Child's being deviſed to a Guardian, who was but a Perſon *intruſted* in that Caſe, ſince nothing could be of greater Concern than the Education of Infants, and more eſpecially of this noble Lord, in whom the Publick was intereſted, and from whom his Prince and Country might juſtly have Expectations. As to what was ſaid of a Guardian's being *in loco Parentis*, the Solicitor General replied, that there was a Diverſity betwixt a natural Parent and a Guardian, for that if the latter was for marrying a Ward under his Quality, it was moſt uſual for this Court to interpoſe; but not ſo in Caſe of a Father's endeavouring to marry his Infant Child to one beneath him.

This Court will interpoſe, if Guardians give Occaſion to ſuſpect their Behaviour.

But *Lord Chancellor* ſaid, this Court would and had interpoſed, even in the Caſe of a Father, as where the Child had an Eſtate, and the Father, who was inſolvent and of an ill Character, would take the Profits, there the Court has appointed a Receiver, as was done in the Caſe of *Kiffin* verſus *Kiffin*. Likewiſe in Anſwer to the Objection that the Court ſhould not interpoſe until the Guardians have misbehaved; *His Lordſhip* obſerved, that *preventing Juſtice* was to be preferred to *puniſhing Juſtice*; and that he ought rather to prevent the Miſchief and Misbehaviour of Guardians, than to puniſh it when done. That if any wrong Steps had been taken which might not deſerve Puniſhment, yet if they were ſuch as induced the leaſt Suſpicion of the Infant's being like to ſuffer by the Conduct of the Guardians, (as there were in this Caſe) or if the Guardians choſe to make Uſe of Methods that might turn to the Prejudice of the Infant, the Court would interpoſe, and order the Contrary; and that this was grounded upon the general Power and Juriſdiction which it had over all Truſts, and a Guardianſhip was moſt plainly a Truſt.

But it appearing that Lord *Noel* was recovered in his Health, and had made a conſiderable Progreſs in the School, and that a new Method of inſtructing him might retard his Learning: The Court ſuſpended that Part of the Order which had been before made for removing him from *Weſtminſter* to *Eaton*, the *Lord Chancellor* acquainting his Lordſhip, that while he behaved himſelf well and regularly at *Weſtminſter* (which it was not doubted but he would do) he ſhould ſtay there; but if otherwiſe, the Court would remove him to *Eaton*.

Alſo the Guardianſhip of the Infant Duke being deviſed to Mr. *Berty* and Mr. *Grevill*, until his Grace ſhould come to Age, and it being recommended to the Guardians to take the Advice of the late Duke of *Ormond* in the Education of the Infant; I objected, that if the Duke of *Ormond* had been naturally dead, this Reſtraint had been at an End; and it ſeemed to be the ſame, the Duke of *Ormond* being attainted, which was a Civil Death.

Guardians are recommended by Will to act with the Advice of *J. S.* and *J. S.* is attainted, this Superintendency devolves upon the Great Seal.

But the Court ſaid, this ſhewed that the Education of the Infant Duke was not to be merely at the Diſcretion of the Guardians; and there being a Diſability in the Duke of *Ormond*, it devolved on the Great Seal as the general Guardian of all Infants; wherefore it was directed that in all Caſes touching the Education of the Infant Duke, the Guardians ſhould apply to, and adviſe with, the Duke and Ducheſs of *Grafton*, the Ducheſs being the Aunt of the Infant Duke, and likewiſe with the Duke and Ducheſs of *Portland*, who were his near Relations. And Mr. *Berty* the Guardian deſiring the Duke might return to *Oxford* where he had been for ſome Time, the Court referred him to the two noble Dukes above mentioned, for their Thoughts upon the Matter.

Sandys verſus *Sandys.*

Caſe 206.
Lord Chancellor Macclesfield.
See the Caſe of *Butler* and *Duncomb* ante 448.
A Reverſionary Term ſold for the raiſing a Daughter's Portion.

SIR *Richard Sandys* on his Marriage with *Mary* the Daughter of the Lady *Rolle*, in Conſideration of the Marriage, and of 5000 *l.* Portion, by Indentures of Leaſe and Releaſe, dated the 11th and 12th of *April* 1698, ſettled Lands of the Value of 587 *l. per Annum* in the County of *Kent*, to the Uſe of himſelf for Life, Remainder, as to Part of the Premiſſes (amounting to 500 *l. per Annum*,) to his intended Wife for her Life as a Jointure, Remainder to the firſt, *&c.* Son of the Marriage, in Tail Male, Remainder to Truſtees for 500 Years, *ſans Waſte*, in Truſt to raiſe Portions for Daughters, the ſame to be raiſed by Sale or Mortgage, or by Rents, Iſſues and Profits, (*viz.*) 5000 *l.* if but one Daughter, 6000 *l.* if more than one, and to be paid at the Daughters Age or Ages of twenty-one, or Marriage, if after fourteen, or under, if with the Conſent of the Mother and two other Perſons if then living; with Power for Sir *Richard Sandys* to make a Jointure of 150 *l. per Annum* on a ſecond Wife, and in the Deed there were Lands of 187 *l. per Annum* in *Yorkſhire*, ſettled on Sir *Richard* and his Heirs. Sir *Richard* had Iſſue four Daughters and no Son by his firſt Wife, and on her Death married again.

The Eldeſt Daughter after her Age of fourteen married the Plaintiff, who brought this Bill for the raiſing of his Wife's 1500 *l.* (being a fourth Part of the 6000 *l.*) in the Life-Time of her Father. On hearing of the Cauſe, the Scantineſs of the Eſtate being inſiſted upon, and that it would be greatly detrimental to ſell or mortgage the Reverſion in the Life of the Father, eſpecially as the Daughters had other Proviſions left them by their Grandmother; and that this Matter of Truſt was entirely in the Diſcretion of the Court: It was referred to a Maſter, to ſtate the Value of the Eſtates compriſed in the Settlement.

(*a*) January 26. 1721.

And the Caſe coming on afterwards (*a*) before the *Lord Chancellor*, it was urged on Behalf of the Plaintiff, that the Truſt being to raiſe Portions by Mortgage or Sale, payable at Marriage, if after the Age of fourteen; and the Daughter having before her Marriage attained that Age, her Portion ought, by the expreſs Words of the Deed, now to be raiſed by Sale or Mortgage of the Term; that the Intention of the Truſt was to have the Portions raiſed ſo, as that the Daughters might be preferred in Marriage at ſeaſonable Times, and not wait until the Father's Death, when they might be upwards of forty or fifty, and paſt the proper Age for Marriage; that this appeared the more reaſonable in the preſent Caſe, foraſmuch as the Father had received 5000 *l.* Portion with the Mother, and was but to add 1000 *l.* to it, which the Intereſt of 5000 *l.* would in a little Time produce, and ſeveral Precedents in Point were cited, (*viz.*) *Greaves* and *Maddiſon*, T. Jones 201. *Corbet* and *Maidwell*, Salk. 159. *Gerrard* (*b*) and *Gerrard*, *Stanyforth* (*c*) and *Stanyforth*, and particularly Lord *Allington*'s Caſe, where a Reverſion was ſold for Payment of Daughters Portions, which fell into Poſſeſſion within a ſhort Time after the Sale. That the mortgaging the Reverſion could be no Prejudice to the Father; for whether there was a Mortgage or not, ſtill the Portion muſt carry Intereſt, and the Eſtate be charged therewith from the Time of its becoming due.

(*b*) 2 Vern. 458.

(*c*) 2 Vern. 460.

Alſo there being a Proviſo in the Deed, that the Portions or any Part thereof ſhould not be raiſed until they became due, this was ſaid to be an Argument of the Intention of the Parties, that when they became due they ſhould be raiſed.

Lord Chancellor: The ſelling or mortgaging Reverſions ſeems a great Hardſhip, being in Effect to ruin a Family, for the raiſing of Daughters Portions; and therefore I will not go one Step farther, than Precedents ſhall force me. This Method cannot fail of tempting Daughters to Diſobedience towards their Fathers, and encouraging improvident Marriages. Had the Portion been intended to be raiſed by Sale of the Reverſionary Term in the Father's Life-Time, it ſhould (and in my Opinion would) have been ſo expreſſed. By the ſame Reaſon that a Reverſionary Term may be ſold for the raiſing Daughters Portions, ſo may it be for the raiſing Portions for younger Children by Virtue of the common Clauſe in Marriage Settlements to that Purpoſe; which would be ruining an Heir at Law for the Sake of younger Children. The Intention ſeems to have been againſt any Sale or Mortgage, until ſuch Time as the Truſtees could take the Profits; the Word [Profits] ſtanding in Oppoſition to the Words [Sale or Mortgage;] and the Caſe of the Mother's leaving Daughters, which ſhould claim their Portions againſt their Father, does not appear to have been within the View of thoſe who made the Settlement.

But at length *(animo reluctante) His Lordſhip* decreed, that the Truſtees ſhould ſell or mortgage a fourth Part of this Term of five hundred Years (ſubject to the Father's Power of making a Jointure upon his ſecond Wife) for the raiſing a Portion of 1500 *l.* and Intereſt from the Marriage; ſaying that though this was a Matter of Truſt, yet ſince all the Contingencies had happened, and nothing remained to ſuſpend the Execution of ſuch Truſt of the Term, and it did not evidently appear but that the Parties intended the Portions ſhould be raiſed out of the Reverſionary Term; therefore he did not look upon it to be within the Diſcretion of the Court, any more than in the Option of the Truſtees, whether they would or would not raiſe the Money; but ſaid it was a Thing not to be encouraged. That as to what had been objected of the Daughters having other Proviſions left them by their Grandmother, he did not think that material; for if they had a Right to their Portions by the Settlement, they ought not to loſe that Right by another Relation's Kindneſs in leaving them a farther Proviſion.

Caſe 207.
Lord Chancellor Macclesfield.

Frederick verſus *Frederick*.

One for a valuable Conſideration contracts to be a Freeman of *London*, but dies before he has taken up his Freedom, his Perſonal Eſtate ſhall be divided as if he had been a Freeman, but his Children not to be City Orphans.

THIS Bill was brought by *Leonora Frederick* Widow, for the Performance of her Marriage Agreement.

Thomas Frederick Eſq; Son of Sir *John Frederick* Knt. late Lord Mayor of *London*, in *January* 1674, applied to marry the Plaintiff *Leonora*, one of the Daughters of *Charles Mareſco*, who was an Orphan of the City of *London* (being Daughter of a Freeman;) and the Marriage being agreed upon between the Relations on both Sides, Sir *John Frederick*, by Indentures of Leaſe and Releaſe, ſettled diverſe Houſes of 330 *l.* *per Annum* to the Uſe of *Thomas Frederick* (his Son) for Life, Remainder to the Plaintiff *Leonora* his intended Wife for Life for her Proviſion, Remainder to the firſt, &c. Son of the Marriage in Tail Male, Remainder to Truſtees for 1000 Years for Daughters Portions if no Iſſue Male.

And by another Deed of the ſame Date, the Sum of 6500 *l.* which was Sir *John Frederick*'s Money, and alſo 600 *l.* computed to be the Reſidue of the Plaintiff *Leonora*'s Portion (beyond 5000 *l.* which Mr. *Frederick* the Huſband was to receive) was aſſigned over in Truſt to be laid out in a Purchaſe, and to be ſettled on Mr. *Frederick*

derick the then intended Huſband for his Life, Remainder to the Plaintiff *Leonora* the intended Wife for her Life, with Remainder to the firſt, *&c.* Son of the Marriage.

Afterwards, and before the Marriage, the Plaintiff *Leonora* being an Orphan, and conſequently the Licence of the Court of Aldermen (who are Guardians of the City Orphans) being neceſſary to the Marriage to avoid being liable to Commitment, Application was made to the Court of Aldermen for their Conſent: Whereupon an Entry was made at a Special Court held the 15th of *February* 1674. N° 22. "That at this Court
" Licence is granted to *Leonora Mareſco*, one of the
" Daughters and Orphans of *Charles Mareſco* late Ci-
" tizen and —— of *London* deceaſed, to marry *Tho-*
" *mas Frederick* Eſq; Son and Heir apparent of Sir *John*
" *Frederick*, Knt. and Alderman, provided that Mr.
" Common Serjeant do approve of the Settlement made
" upon the ſaid Orphan, and ſignify the ſame to this
" Court." And the ſaid Sir *John Frederick* did there promiſe and engage, that if the Settlement ſhould not prove ſatisfactory to the Common Serjeant, and to the Court, that he would make up and enlarge the ſame to the Satisfaction of the Court; and the ſaid Mr. *Frederick* being thereunto required, did promiſe and engage, and the ſaid Sir *John* did alſo undertake on his Behalf, to take up his Freedom of the City within one Year next enſuing.

N° 22. At the ſame Court it was agreed, "That
" when any Perſon not free of the City ſhould addreſs
" themſelves to the Court, for a Licence to marry
" an Orphan of the City, that they ſhould be firſt
" required and urged by the Court to take up their
" Freedom, before the Court would give Conſent to
" ſuch Marriage.

Nº 23. At the ſame Court, upon the humble Deſire of Mr. *Thomas Frederick*, Son of Sir *John Frederick* Knight and Alderman of *London*, and *Grocer*, being capable of Freedom by Patrimony, but deſiring to be admitted by Redemption into the Company of
it is ordered by this Court "That he ſhall be admit-
"ted to the Freedom of this City by Redemption in
"the ſaid Company of he paying to Mr.
"Chamberlain for the City's Uſe 3 *s.* 4 *d.*"

Mr. *Frederick* performed no Part of the Agreement, either in taking up his Freedom, or in laying out the Truſt Money in a Purchaſe.

March 15. 1680, at the Court of Aldermen (Nº 24) upon ſome Debate had touching Mr. *Frederick*, who had married one of the Daughters of *Charles Mareſco* deceaſed, and had not taken up his Freedom of the City according to his Promiſe made to the ſaid Court, at the Time when he had Licence to marry, whereby ſhe, in Caſe ſhe ſurvived him, would not be entitled to the Thirds of his Perſonal Eſtate, in like Manner as the Widows of Freemen were; it was by the ſaid Court referred to Mr. *Recorder* and Mr. *Common Serjeant* to peruſe and conſider of the Settlement made upon the ſaid Orphan; as alſo the Marriage Agreement, and to ſee if the ſame were made according to the Direction and Intention of the Court, and Mr. *Frederick*'s Promiſe, and to certify to the Court how they found the ſame, with their Opinions therein. At which laſt Court Sir *John Frederick* ſat as *Locum Tenens* for Sir *Patience Ward* the Lord Mayor.

Mr. *Frederick* had two Sons and three Daughters, and by his Will dated the 20th of *May* 1718, gave to his eldeſt Son *John* 1000 *l.* to his ſecond Son *Thomas* 1000 *l.*

to his three Daughters 1000 *l.* each, and 10 *l.* to his Wife; and deviſed ſuch Part of his real Eſtate as was unſettled to his ſecond Son *Thomas* in Tail, but gave the Bulk of his Eſtate to his three Grandſons, being the Children of his ſecond Son *Thomas Frederick*; after which the Teſtator died.

His Widow now brought her Bill, inſiſting that her Husband having made the Agreement *ut ſupra*, for a valuable Conſideration, (*viz.*) that of Marriage, and to induce the Court of Aldermen to conſent to his marrying their Orphan, he ought to be taken as a Freeman, and in Conſequence thereof, his Perſonal Eſtate to be diſtributed as ſuch, (*viz.*) The Widow to have one Third, his Children another Third, and only the remaining Third to paſs by the Will.

The *Lord Chancellor*, after Debate of this Caſe at the Bar, took Time to conſider of it; and this Day (being the 25th of *Auguſt* 1721) decreed the Perſonal Eſtate of Mr. *Frederick* to be liable to the Cuſtom of *London*, and that he ſhould be taken as a Freeman of *London*, he having for a valuable Conſideration agreed to become ſuch.

The Demand is grounded upon this Rule, that where one for a valuable Conſideration agrees to do a Thing, ſuch executory Contract is to be taken as done; and that the Man who made the Agreement ſhall not be in a better Caſe, than if he had fairly and honeſtly performed what he agreed to. This is to be taken as a Contract made by the Court of *Aldermen* with Mr. *Frederick* himſelf; and now the Queſtion is, Whether he ſhall by Will give away his perſonal Eſtate, contrary to his own Agreement? When Mr. *Frederick* engaged to take upon himſelf the Freedom of the City, it was the ſame as if he had agreed that the Perſonal

Eſtate which he might die poſſeſſed of, ſhould go according to the Cuſtom of the City of *London*, one Third to his Widow, and another Third to his Children.

Object. This is no Part of the Marriage Agreement, there being on that Occaſion ſolemn Deeds, one, a Settlement of Lands, and another of Money to be laid out in Lands, ſaid *to be a Proviſion for the Wife*, in which no Mention is made that the Widow or Children ſhould have the Benefit of the Cuſtom of *London*.

Reſp. It may be admitted that this was the Agreement, and all the Agreement that was made between the Parties, (*viz.*) the Relations on the Man's and on the Woman's Side. But ſtill there were other Parties to be conſulted, who were Guardians of the Infant, as being a City Orphan; and the Agreement between the Relations could no ways bind the Court of Aldermen, being no more than a bare *Propoſal* as to them. If the Court of Aldermen had been Parties to the Agreement, it had been ſomething, but they were not, it was *Res inter alios acta*, and however it might conclude the Relations, cannot conclude the Court of Aldermen who are Guardians of City Orphans, and without whoſe Leave no Man can marry ſuch Orphan, under Pain of Impriſonment: When the Agreement betwixt the Relations was brought to the Court of Aldermen, and laid before them as a Propoſal, (for it could be no more) that Court might have rejected the whole, altered any Part, or have required an Addition to it; and this Matter being before the Statute of Frauds and Perjuries, had the Agreement been by Parol only and without any Writing, it had notwithſtanding been good.

But did the Court of Aldermen agree to this Propoſal of the Relations made with Regard to the Settlement on this Marriage?

No, they did not; they inſiſted upon ſomething farther; ſo that theſe Settlements were an Agreement by thoſe who had no Authority: Whereas they, who had the Authority and were Guardians of the Orphan, did not agree, but made other additional Terms, that Mr. *Frederick* ſhould take upon him the Freedom of *London*, in order to entitle his Wife and Children to the Benefit of the Cuſtom; and theſe additional Terms are complied with by Mr. *Frederick* and his Father Sir *John*, *i. e.* Mr. *Frederick* the Son and Sir *John* the Father on Behalf of the Son, do agree that he ſhall become a Freeman of *London* within a Year then next enſuing: Which Agreement being entered among other the Proceedings and Orders of the Court of Aldermen, and that Court being a Court of Record, is become Matter of Record; it is as much ſo as a Fine would be if levied there; for it is the Concord between the Parties; and to prevent every Thing which might look like taking Advantage of Mr. *Frederick* in gaining this Agreement from him after his Affections were ſettled upon the young Lady, therefore Sir *John Frederick* the Father is made Party thereto, and undertakes the Performance on Behalf of his Son. So that there can be no Doubt of the Agreement's being made by Mr. *Frederick* and his Father, that it was Part of the Marriage Agreement, made in Conſideration of the Marriage, and of the Court of Aldermen's giving their Conſent to Mr. *Frederick*'s marrying their Orphan, to whom they were a political Guardian; it appears to have been made upon a full and valuable Conſideration, and conſequently ought as near as may be to be performed.

But it is objected on the other Side, 1*ſt*, That this Agreement is not made for the Benefit *of the Wife and Children*, but of the *City*, that Mr. *Frederick* who was rich by marrying a City Orphan entitled to a conſiderable Fortune, and was the Son and Heir apparent of a very wealthy Citizen who had been Lord Mayor, ſhould bear the Burden of the City Offices; which might be for the Honour and Eaſe of the City.

Reſp. This is a ſtrange and monſtrous Conſtruction, that while the Court of Aldermen are doing not only an honeſt Act, but an Act of Juſtice in making Terms for the Benefit of the Orphan, this ſhould be interpreted as Self-Intereſt and Knavery, in taking Care to help themſelves to proper Perſons for ſupplying their burdenſome Offices. If ſuch ſelf-intereſted and diſhoneſt View had been entertained by ſome of them, ſtill the reſt could not have been preſumed to come into it; but ſuppoſing it to have been the Intent of ſome of them, it was preſently afterwards forgot, or rather appears never to have been their Intent; for by a ſubſequent Order of a Court of Aldermen, where Sir *John Frederick* the Father was *Locum Tenens* of the then Lord Mayor, it was taken Notice of, that Mr. *Frederick* was not become a Freeman, whereby the Orphan *Leonora Frederick* would loſe her Thirds (which ſhews that the Intent of putting Mr. *Frederick* to accept of his Freedom, was that his Wife might have her Thirds,) and it was therefore referred to the Recorder and Common Serjeant of the City, to ſee what Proviſion had been made for Mrs. *Frederick* the Orphan.

Object. The Court of Aldermen referred it to the Common Serjeant to approve of the Deeds of Settlement made by Sir *John Frederick* upon his Son's Marriage, and it is to be preſumed, that the Common Serjeant did approve of them, which Deeds are ſaid to be a Proviſion for the Wife, but mention nothing of Mr. *Frederick's* Agreement to take up his Freedom of the City.

Reſp. It ſhould ſeem as if only the *Validity of the Deeds of Settlement*, and *not the Value of the Eſtate ſettled*, were referred to the Common Serjeant; for as to the Value, the Court of Aldermen could as well judge of that as the Common Serjeant; neither is it proper or uſual for Counſel to give their Opinion upon the Value of Eſtates, which is no Matter of Law. But admitting that both the Validity and the Value of what was ſettled were intended to be referred to the Common Serjeant, yet the Agreement of Mr. *Frederick* to take up his Freedom, was an additional Part of the Proviſion inſiſted upon by the Court of Aldermen, and ſubmitted to by Mr. *Frederick*.

Object. If the Benefit accruing to the Wife and Children by the Freedom of the City was Part of the Agreement and the Intent thereof, why was there a Year's Time given to Mr. *Frederick* to take up his Freedom, which might have been done in a Day? And there being the Delay of a Year, Mr. *Frederick* might have died within that Year, by which Means the Advantage intended to accrue to the Wife or Iſſue by ſuch Freedom, would have been loſt.

Reſp. It might be reaſonable to allow Mr. *Frederick* ſome Time to take up his Freedom, but it looks as if he was not determined of what Company he would be free: And as the eldeſt Son (or Daughter, if no Son) was provided for by the Marriage Deeds, ſo it was not likely that within the firſt Year there would be any younger Sons; leſs likely was it that within ſo ſhort a

Time

Time as the firſt Year, Mr. *Frederick* would have differed with his Wife, or have been prejudiced againſt any Infant Child. So that if Mr. *Frederick* had died within the Year, leaving a Will, it had probably been in Favour of his Wife and Child; or if he had died inteſtate, his Perſonal Eſtate would have fallen to his Wife and Children by the Statute of Diſtribution.

Object. So great a Length of Time having intervened ſince the Marriage, (between forty and fifty Years) and it appearing that the Court of Aldermen did afterwards pay the Reſidue of Mrs. *Frederick*'s Portion to Mr. *Frederick*, it may therefore be preſumed, that this Agreement for Mr. *Frederick*'s taking up his Freedom was waived.

Reſp. Who could waive it? The Wife who was a Feme Covert all the while could not, and it cannot be ſuppoſed that the Children without the Wife who were under the Command of their Father, and with whom the Agreement was not made, could waive it, nor is it pretended that they have done ſo; and as to the Mayor and aldermen, they themſelves neither have nor could waive it, becauſe from the Time of making this Agreement they were but Truſtees, and their Releaſe would have been a plain Breach of Truſt, which would not have barred the *Ceſtuy que Truſt*, nor could it have been available to thoſe who were Parties to ſuch Breach of Truſt. And as there could be no Waiver, ſo could there be no Laches in the Parties now claiming the Benefit of this Agreement; for as to Mrs. *Frederick* the Wife, who was to have her Thirds by the Cuſtom in Caſe of Mr. *Frederick*'s becoming a Freeman, ſhe was all the while under Coverture, and the Children the greateſt Part of the Time Infants.

No Laches to be imputed to a Feme Covert or Infant.

Object. But Mr. *Frederick's* not being called upon all this Time to take up his Freedom, has occaſioned his dying poſſeſſed of a greater Perſonal Eſtate than otherwiſe he would have done. For if he had been called upon to do it, he would probably have laid out the greateſt Part of his Eſtate in Land, and ſo have diſappointed the Cuſtom.

Reſp. The Effect of this Argument is, that if Mr. *Frederick* had had Notice or had thought of this, he would have cheated his Wife and Children; but not having had Notice, nor thinking of it, he has not cheated them. As Matters have been managed, a fair Experiment has been made, what Perſonal Eſtate, and to what Value, Mr. *Frederick* would think fit to die poſſeſſed of; what Perſonal Eſtate to inveſt in Land, and likewiſe what to keep ſubſiſting at his Death. It had been a harſh Thing (tho' perhaps (*a*) lawful) for Mr. *Frederick* to have inveſted his Perſonal Eſtate in Land, on Purpoſe to avoid his own Agreement, and diſappoint the Cuſtom. All that can be ſaid on this Head, is that a Man, who, as the other Side ſuppoſes, would not, if he had thought of it, have kept his Agreement, has not thought fit to avoid it.

(*a*) Vide ante 530. *Babington verſus Greenwood.*

If a Man covenants, on good Conſideration, to lay out a Sum of Money in a Purchaſe of Land, to be ſettled on himſelf and the Heirs of his Body by his Wife, and he afterwards differs, and falls out with his Children, and declares that they ſhall have no Benefit of this Covenant, and dies before he has laid out the Money, yet a Court of Equity will out of his Aſſets decree this Money to be laid out in Land, and ſettled accordingly; nor would it be any Excuſe to ſay, that if it had been laid out, it would have been an Eſtate-tail in him, which he afterwards might have barred, though he could not bar the Eſtate-tail till the Money was laid out, and the Eſtate ſettled after the Purchaſe thereof.

Object. As to this Right of the Wife and Children to their Shares of Mr. *Frederick*'s Perſonal Eſtate, ſhe, or they that would make Title thereto, muſt bring themſelves within the Cuſtom, and Equity is not to enforce or aid the Cuſtom, or to intermeddle with the Matter.

Reſp. Surely, if there be a Contract for a valuable Conſideration, that ſuch a one will take up his Freedom, in order to entitle his Wife and Children to the Benefit of the Cuſtom, Equity will enforce the Performance of this as well as of any other Contract. It is thus Equity every Day relieves againſt Fraud in endeavouring to avoid the Cuſtom by (*a*) Aſſignments of Leaſes or Perſonal Eſtate, which is all in Aid of the Cuſtom.

(*a*) Vide 2 Vern. 98, 612.

Object. If there had been a Suit againſt Mr. *Frederick*, to have compelled him to take up his Freedom, and a Decree for that Purpoſe, and he had ſtood obſtinate, and would not have performed it, this would not have intitled the Widow and Children to their Thirds by the Cuſtom; becauſe Mr. *Frederick* was not actually a Freeman. Accordingly, it has been compared to the Caſe * where Tenant in Tail made a Mortgage, and covenanted to levy a Fine to the Mortgagee, the Mortgagee brought a Bill againſt the Tenant in Tail, to compel him to levy ſuch Fine, which was decreed; but the Tenant in Tail being obſtinate, was impriſoned for not performing the Decree, and died, there the Mortgagee had no Benefit of the Decree, but loſt his Money,

---

* This was the Caſe of *Weale* verſus *Lower*, cited 2 Vern. 306. and Precedents in Chancery 279.

Money, by the Iſſue in Tail's avoiding the Mortgage; and if the Widow and Children would not have been entitled, though there had been a Decree in their Favour, much leſs can they be ſo here, where there is none.

Reſp. 'Tis very true, that in Caſe of a Decree againſt Tenant in Tail to levy a Fine, who dies before he has performed the Decree, the Iſſue is not bound, becauſe he claims Paramount the Tenant in Tail, and *per formam Doni*; but in the principal Caſe Mr. *Frederick* is not by this Agreement binding his *Iſſue in Tail*, but his *Executors*; and ſurely it will not be ſaid that a Man cannot bind his Executors. On the contrary, they are bound of courſe without being named, though the Heirs are not.

Vide 2 Vol. 197.

Object. By the ſame Reaſon that Mr. *Frederick* ſhall in Equity be taken for a Freeman of *London* by Virtue of this Agreement, ſo alſo ſhall his Children be Orphans, and under the Guardianſhip of the Court of Aldermen, as they would have been, if Mr. *Frederick* had been actually free.

Reſp. The Guardianſhip of a Child is only (*a*) a Truſt, and no Profit, and therefore not within the Reaſon of that Part of the Cuſtom which entitles the Widow and Children to their Thirds: Beſides, the Guardianſhip only concerns the Court of Aldermen, who by their Non-claim may have barred themſelves of their Right, tho' they could not bar the Infants of what belonged to them.

(*a*) See in the Caſe of the Duke of *Beaufort* and *Berty*, ante 704.

Object. Mr. *Frederick*'s Death alters the Caſe; for he cannot be made a Freeman after his Death; and ſo the Act of God makes it impoſſible that this Agreement ſhould be ſpecifically performed.

Reſp. It is the Subſtance and the chief End of the Agreement, that Equity will enforce, *viz.* that the Widow and Children ſhould have their Thirds of the Perſonal Eſtate, *which* is not impoſſible to be performed. This, tho' Mr. *Frederick* be dead, a Court of Equity may, and, I think, ought to ſee executed. Mr. *Frederick*'s unkind Uſage of his Wife and Children (it appearing by the Proofs that never had a Man a more dutiful Wife and Children, nor ever a Wife or Children a more unkind Husband or Father, and not one Witneſs being examined on the other Side) plainly entitles them to the Compaſſion of the Court, as does the extreme Severity of the Will, and the very narrow Proviſion made for them thereby. 'Tis farther obſervable, that by the Articles of Separation between Mr. *Frederick* and his Wife and Children, they were not to come within ſo many Yards of his Houſe, under certain Penalties; and therefore cannot be blamed * *for going from the Teſtator in his Life-time, and in his Old Age, without his Leave, and againſt his Conſent*, when, by thoſe Articles, they were not to come within ſo many Yards of his Houſe without a Forfeiture.

Upon the whole Matter, Mr. *Frederick* having upon good Conſideration made the Agreement to become a Freeman of *London* within a Year, and having ſurvived that Year, he ſhall in Equity be taken for a Freeman, and his Perſonal Eſtate diſtributed accordingly, *viz.* one Third to the Wife, another Third to the Children, and the Will to operate only on the dead Man's Third; the Wife to have the Benefit of her Chamber and Paraphernalia, but the Legacies given by the Will to the Children to be void, they not being given out of the (*a*) dead Man's Part, but out of the whole Perſonal Eſtate, and ſo to be void, unleſs the Children releaſe their Right to the reſt of the Eſtate, and abide by the Will.

(*a*) Quær. & vide ante *Babington* verſus *Greenwood* in the Note, 533.

I This

---

* See Mr. *Frederick*'s Will.

This Decree was afterwards affirmed in the Houſe of Lords with 200 *l.* Coſts.

Cann verſus *Cann.*

Caſe 208. Lord *Macclesfield.*

See more relating to this Cauſe *ante* 213. Where Matters have been examined in Equity, and determined, the Court cautious of unravelling former Decrees, Agreements or Releaſes.

SIR *Robert Cann* had a Wiſe, and two Sons, *William* (afterwards Sir *William*) his eldeſt Son, and *Thomas* (afterwards Sir *Thomas*) *Cann*; Sir *Robert Cann* being ſeiſed in Fee of divers Manors, Meſſuages and Lands, in or near *Briſtol* in *Somerſetſhire*, made his Will dated the 19th of *Aug.* 1681, whereby he deviſed the Bulk of his Eſtate to his Lady for Life, Remainder to his younger Son *Thomas* in Tail, Remainder over, and gave only an Annuity of 200 *l. per Ann.* to his eldeſt Son *William*, on Condition that he ſhould releaſe his Right to every other Part of his Father's Eſtate; and made his Wiſe Executrix. The 10th of *Nov.* 1685 Sir *Robert Cann* died, when his Wiſe entred upon the Eſtate, and proved the Will in the Spiritual Court; and in the ſame Term ſhe and her younger Son *Thomas* brought their Bill againſt Sir *William Cann* (the eldeſt Son and Heir) to eſtabliſh the Will.

Hill. Term. 1685 Sir *William Cann* put in his Anſwer to the Bill, inſiſting that his Father the Teſtator had, after the making the Will of 1681, *viz.* the Summer before he died, made a latter Will, and had himſelf told the Defendant of his having done ſo, calling the former his *mad* Will. The ſame Term alſo Sir *William* brought a Croſs Bill againſt his Mother the Lady *Cann*, and his younger Brother *Thomas*, for the Diſcovery and ſetting up of this latter Will. To which Croſs Bill both the Defendants anſwered, and denied any Knowledge or Belief of any latter Will.

Paſcha

Paſchæ 1686, the Lady *Cann* exhibited another Bill againſt Sir *William*, to compel him to make his Election, whether he would accept the Annuity deviſed to him, and releaſe his Title to the Eſtate; or waive his Legacy: To which latter Bill Sir *William* anſwered, again inſiſting upon the latter Will, and that he had ſeen it; whereupon Witneſſes were examined on both Sides in all theſe Cauſes, and the 15th of *November* 1687, the two laſt Cauſes being heard together, the Bill of Sir *William Cann* the Heir, as to ſuch Part of it as ſought to impeach the Validity of the Will of 1681, or to ſet up the ſubſequent Will, was diſmiſſed.

April 1688 the Lady *Cann* died, having made her Will, and *Thomas* her younger Son, Executor thereof, who entered upon the Bulk of his Father's Eſtate ſo deviſed to him.

The 20th of *April* 1689 Sir *William Cann* and his Brother *Thomas* came to an Agreement for concluding all Matters in Difference between them, and for eſtabliſhing Peace in the Family; and by Indenture of that Date, reciting the Will of 1681, Sir *William Cann*, in Conſideration that his Brother *Thomas* had agreed to convey to him the ſaid Sir *William*, and the Heirs of his Body, with Remainder to the right Heirs of Sir *Robert Cann* the Father, the Manor of *Breane* in *Somerſetſhire*, (being Part of the Eſtate deviſed to *Thomas* by the Will of 1681) did grant and releaſe to *Thomas* in Special Tail all the reſt of the Eſtate deviſed *or mentioned to be deviſed* to the ſaid *Thomas* by the Will of 1681. And accordingly *Thomas* conveyed the Manor of *Breane* to Sir *William Cann* in Special Tail, who gave him a general Releaſe; whereupon Sir *William* took Poſſeſſion of the Manor of *Breane*, and enjoyed it to his Death.

Hill. 1694, after all theſe Tranſactions, Sir *William Cann* exhibited a new Bill, ſetting up a latter Will, which he inſiſted the Lady *Cann* had burnt, and examined his Witneſſes *de Bene eſſe*.

Thomas Cann, the ſecond Son, pleaded, as to all Relief ſought by this Bill, the ſeveral Suits and Proceedings, Decrees, Articles, the Conveyance of *Breane*, and the Releaſe.

The 15th of *November* 1695, it was referred to the Maſter, to ſee whether the former Suits were for the ſame Matter, who upon the 20th of the ſame Month reported them to be for the ſame Matter; but that the Plaintiff, Sir *William Cann*, had made farther Charges in his Bill, calling them *new Diſcoveries*; tho' they were but new Evidences of the pretended latter Will.

Whe 24th of the ſame *November* the Plea was argued before the Lord *Sommers*, who ordered the Parties to attend him with the Proceedings in the former Cauſe, and with the Bill and Plea in this Cauſe, which he would conſider of; and the 27th of *July* 1696 the Plea being re-argued, the Lord *Sommers* ordered the Defendant, *Thomas Cann*, to anſwer the new Matters, but no farther Proceedings to be had without Leave of the Court. The Defendant anſwered accordingly, but denied every new Charge in the Bill.

The 17th of *July* 1697, on Sir *William Cann*'s Petition for Liberty to reply to the Anſwer, and to examine the Witneſſes in chief, it was ordered, that the Defendant by *Bartholomew-tide* ſhould give his Anſwer, whether he would conſent to the Hearing of the Cauſe, and have an Iſſue directed, whether Sir *Robert Cann* did make a Will ſubſequent to that of 1681. But the Defendant being adviſed not to conſent to this, the 23d of *October* 1697, upon Sir *William Cann*'s Motion it was ordered that the Examiner ſhould attend the *Lord Chancellor* with the Depoſitions, and leave them with his Lordſhip; and that on Conſideration thereof the Court would give farther Directions.

The 2d of *July* 1698 Sir *William Cann* died, and in *Trin.* Term 1716 the Plaintiff, his Son and Heir, upon coming to Age, brought his Bill of Revivor, and after examining Witneſſes on both Sides, the Cauſe came on to Hearing before the Lord *Macclesfield*, who having taken Time to conſider thereof, now gave Judgment, and diſmiſſed the Bill.

His Lordſhip ſaid, that this Cauſe was of great Conſequence to the Court, for which Reaſon it ought (tho' on the ſtrongeſt Proof) to be very cautious of giving Relief in a Caſe, where the Matter had been examined and determined; where, after that, there had been a full Agreement of the Parties, to releaſe this Suit; and where there was a Conveyance of Land made by the Defendant to the Plaintiff's Father, accepted by him in Satisfaction of all his Demands, and the Plaintiff himſelf ſtill in Poſſeſſion of the Land thus given in Satisfaction; that at the ſame Time there was no Charge of any Fraud in the Defendant, and the Plaintiff's whole Equity was denied by the Anſwer. That beſides this, it was obſervable, when the Plaintiff, at the Hearing of the Cauſe, was asked whether he would reconvey this Manor of *Breane*, which had been given in Satisfaction of the Plaintiff's Right and Demand? he declined rendring it back again.

His Lordſhip obſerved the prudent Methods of this Court were, that after Publication is paſſed, and the Purport of the Examinations known to the Parties, neither Side is allowed, tho' they come recent, to enter into a freſh Examination of the Matters in Queſtion, ſince otherwiſe there would be no End of Things, and ſuch a Proceeding would tend to Perjury as well as Vexation. But the principal Caſe was much ſtronger; for here the Parties had not only on each Side examined Witneſſes, and thoſe Examinations had been publiſhed, but the Court upon thoſe Examinations had made a Decree, ſince which the Parties had come to an Agreement, and in Conſequence thereof a Conveyance of Land had been made by the Defendant to the Plaintiff's Father in Satisfaction of his pretended Right, and the Lands thus conveyed, enjoyed to this Time by the Plaintiff: That nothing like this had ever been attempted by any Perſon, and if the laſt Bill ſhould prevail, there would be two inconſiſtent Decrees of the ſame Court; one in *Favour* of the Will of 1681, and another *againſt* it: That where two Parties are contending in this Court, and one releaſes his Pretenſions to the other, there can be no Colour to ſet this Releaſe aſide, becauſe the Man that made it had a Right; for by the ſame Reaſon there can be no ſuch Thing as compromiſing a Suit, nor Room for any Accommodation; every Releaſe ſuppoſes the Party making it to have a Right; but this can be no Reaſon for its being ſet aſide, for then every Releaſe might be avoided. Beſides, this Releaſe is very particular, it being of all Lands deviſed, *or mentioned to be deviſed*. Indeed, if the Party releaſing is ignorant of his Right, or if his Right is concealed (*a*) from him by the Perſon to whom the Releaſe is made, theſe will be good Reaſons for the ſetting aſide of the Releaſe. But no ſuch Thing is pretended in this Caſe, and

After Publication, and Examinations known, this Court will not give either Side Leave to examine.

No Reaſon to ſet aſide a Releaſe, becauſe the Party releaſing had a Right. *Secus*, if ignorant of his Right, or if the ſame was concealed from him.

(*a*) See the Caſe of *Broderick* verſus *Broderick* ante 239.

and ſolemn Conveyances, Releaſes and Agreements made by the Parties are not ſlightly to be blown off and ſet aſide.

Then his Lordſhip repeated the Proofs made in this Cauſe on the Part of the Plaintiff, which were but dark and doubtful, ſaying, he did not, on the whole, believe that Sir *Thomas Cann* the Teſtator did actually make a latter Will, though there might be ſome Intentions and Preparations for that Purpoſe; and it was not clear how the Court could have come at it, even if there had been full Proof of a latter Will. However, there being no ſuch Proof, that was not the preſent Queſtion; but here having been a Decree, a Releaſe and a Recompence for ſuch Releaſe, there could be no Colour for Relief.

So the Bill of Revivor was diſmiſſed with Coſts.

DE

Term. S. Michaelis,

1721.

Tipping verſus *Tipping*.

Caſe 209. *Lord Chancellor* Macclesfield.

One dies indebted by Covenant more than all his perſonal Aſſets can pay, and leaving real Aſſets ſufficient, the Widow ſhall have her *Bona Paraphernalia*, in regard the Creditor does not ſuffer thereby, there being real Aſſets for him.

A. By Articles before Marriage covenanted for himſelf and his Heirs, with the Wife's Truſtees, to lay out 3500 *l.* in a Purchaſe of Land to be ſettled on the Wife for her Jointure, Remainder to the firſt, &c. Sons of that Marriage in Tail Male ſucceſſively, and died inteſtate without Iſſue, leaving Aſſets in Fee deſcending to his Nephew, who was his Heir at Law, but the perſonal Eſtate was not near ſufficient for the Payment of his Debts.

The Widow, who was Adminiſtratrix, brought her Bill againſt the Heir, to compel him to make good her Jointure, and to have the Deficiency of the Perſonal ſupplied out of the real Aſſets, and having Jewels, &c. which were her *Bona Paraphernalia* of the Value of 200 *l.* and upwards, the Queſtion was, Whether they in the firſt Place, and in Eaſe of the real Aſſets, ſhould be liable to ſatisfy this Covenant, ſince *Bona Paraphernalia* were Perſonal Eſtate, and the Rule was ſaid to be, That all the Perſonal ought to be applied in Exoneration of real Eſtate.

(*a*) 1 Ro. Abr. 911. The Court divided as to this Point.

A Specific or other Legatee ſhall ſtand in the Place of a Bond or Judgment Creditor, if theſe take their Satiſfaction out of the Perſonal Eſtate.

(*b*) Precedents in Chancery 578.

Lord Chancellor : I take it, that *Bona Paraphernalia* are (*a*) not deviſeable by the Huſband from the Wife, any more than Heir-Looms from the Heir, ſo that the Right of the Wife to the *Bona Paraphernalia* is to be preferred to that of a Legatee. If the Huſband by his Will gives a Leaſe or a Horſe, or any ſpecific Legacy, and leaves a Debt by Mortgage or Bond in which the Heir is bound, the Heir ſhall not compel the ſpecific Legatee to part with his Legacy in Eaſe of the real Eſtate; but though the Creditor may (*b*) ſubject this ſpecific Legacy to his Debt, yet the ſpecific or any other Legatee ſhall in Equity ſtand in the Place of the Bond-Creditor or Mortgagee, and take as much out of the real Aſſets, as ſuch Creditor by Bond or Mortgage ſhall have taken from his ſpecific or other Legacy. Wherefore, if a Legatee ſhall have this Favour in Equity, much more ſhall the Wife be privileged with reſpect to her *Bona Paraphernalia*, which are preferred to Legacies. Indeed, were the Rule of Equity otherwiſe, a ſpecific Legatee ſhould compel the Application of the *Bona Paraphernalia* to pay any Debt in Favour and Eaſe of his ſpecific Legacy. Whereas *Bona Paraphernalia* are liable only to Debts, and in Favour of Creditors, not of an Heir; but any Creditors by Specialty are wholly unconcerned in this Queſtion, they being by reaſon of their Bonds, *&c.* in all Events ſecure, which muſt make it indifferent to them whether they are paid out of the real Aſſets, or out of the *Bona Paraphernalia*; for ſtill they are ſure of being paid; and putting the Creditors out of the Caſe, the *Bona Paraphernalia* ſhall be retained by the Wife.

The Perſonal Eſtate not to be applied in Eaſe of the Real, to the defeating of any Legacy.

So the *Lord Chancellor* denied it to be a Rule, that in all Caſes the perſonal is applicable in Eaſe of the real

Eſtate, for it ſhall not be ſo applied, if thereby the Payment of any Legacy will be prevented, much leſs where it will deprive the Widow of her *Bona Paraphernalia.* *

Dalſton verſus *Coatſworth.*

THE Plaintiff brought a Bill for Relief againſt the Suppreſſion of a Deed, by which the Plaintiff's Uncle had ſettled a Term in ſuch a Manner as that after his and his Wife's Death (which Wife was the Defendant) without Iſſue, the ſame was to come to the Plaintiff for the Reſidue of the Term.

Caſe 210. *At the Rolls.* Where a Deed or Will is ſuppreſſed by the Heir, the Party claiming under ſuch Deed or Will decreed to hold and enjoy, and the Heir or Suppreſſer of the Deed, *&c.* to convey.

The Plaintiff's Uncle was dead without Iſſue, and the Defendant the Wife had burnt the Deed.

The Defendant by her Anſwer but faintly denied it, (*viz.*) *That ſhe did not remember* ſhe ever burnt or deſtroyed the ſaid Deed.

The Witneſſes ſwore the Limitations of the Settlement to be in Truſt for the Huſband for Life, Remainder to the Defendant his Wife for Life, Remainder to the Heirs of their Bodies [by one Witneſs,] Remainder to the Iſſue of their Bodies [by another,] and for Want of Iſſue by the Defendant and her Huſband, Remainder to the Plaintiff.

Objected for the Defendant, that the Limitations of the Truſt of the Term being to the Heirs of the Bodies of the Defendant and her Huſband, or to the Iſſue of the Bodies of the Defendant and her Huſband, Remainder over to the Plaintiff, ſuch a Remainder over of the Truſt of the Term was void in Law; and therefore ſuppoſing the Deed to have been ſuppreſſed, yet it could not, were it to be admitted, profit the Plaintiff, or make him any Title.

---

* So decreed by the Lord Chancellor *Macclesfield* in the Caſe of *Puckering* and *Johnſon* the ſame Term.

But by the *Maſter of the Rolls*, it is true, where a Term is limited to a Man and Wife for their Lives, Remainder to the Heirs of their Bodies, and for want of ſuch Iſſue, Remainder over, this Remainder over being but of a Term is void: But on the other Side, a Term may be limited in the following Manner, (*viz.*) to Truſtees, in Truſt for the Huſband and Wife for their Lives, and afterwards for their Children, or for their Iſſue; and for want of ſuch Children or Iſſue living at the Death of the ſaid Huſband and Wife, then to go over to the Plaintiff, and ſuch Limitation is good; now, ſince a Term might be limited in ſuch Manner, I will intend it to have been ſo limited in the preſent Caſe, for every Thing ſhall be preſumed *in odium Spoliatoris* (*a*).

(*a*) Vide 1 Vern. 207, 308.

Then *His Honour* conſidered in what Manner the Decree ſhould be pronounced, and he cited the Caſe in *Hob.* 109. (*b*) *The King and Lord Hunſdon* verſus *Counteſs Dowager of Arundel*, where the King and his Farmer under him claimed Title by the Attainder of *Francis Dacres* who was attainted of High Treaſon, and was ſuppoſed to be Tenant in Tail by Virtue of a Deed not extant, but vehemently ſuſpected to be ſuppreſſed and with-holden by ſome under whom the Defendants claimed, and therefore it was decreed by the then (*c*) *Lord Chancellor*, with the Aſſiſtance of the two Chief Juſtices (*Coke* and *Hobart*) that the King and his Farmer under him ſhould hold the Land until the Defendants produced the Deed, and the Court made farther Order thereon; *His Honour* ſaid, that Sir *John Trevor* his Predeceſſor had ordered this

(*b*) Moor 823.

(*c*) Lord *Elleſmere*.

this Decree to be ſearched for, the Term being mentioned in the Report, but it could not then be found; however, that he himſelf having ſince ordered farther Search to be made, had found the ſame, under the Name of *Hobart, Attorney General* verſus *L*——* ſo that now any Perſon might have Acceſs to the ſaid Decree.

That the next Caſe of this Nature was, that of (*a*) *Sanſon* verſus *Rumſey* Town-Clerk of *Briſtol*, where the Defendant *Rumſey* had articled to give a Portion to *Sanſon* with his Daughter, and the Defendant had the Deed in his Cuſtody; the Plaintiff ſuing for the Portion, and ſetting forth the Purport of the Articles by his Bill, the Defendant pretended in his Anſwer, that the Articles did vary from what the Bill ſet forth, and afterwards burnt the Articles; all which being made to appear, he was committed, and continued under Confinement till he had admitted the Articles to be as the Bill had ſet them forth, which Commitment was only by an interlocutory Order, and the Cauſe never heard. (*a*) 2 Vern. 561.

The next was that of *Hampden* verſus *Hampden*, heard the 8th of *December* 1708, where the Plaintiff claiming as Deviſee under the Defendant's Father's Will; by Proof it appeared that there was ſuch a Will, though no exact Account was given of the Contents thereof; but inaſmuch as the Court was ſatisfied the Defendant had ſuppreſſed the Will, and for that (though no exact Proof was made of the Contents) the Defendant might clear this by producing the Will, therefore it was decreed that the Plaintiff the Deviſee ſhould hold and enjoy until the Defendant produced the Will and farther Order. This Cauſe was firſt decreed by the late *Maſter of the Rolls*, then affirmed by the *Lord Chancellor* on Appeal, and afterwards by the Houſe of Lords.

---

* See alſo this Caſe particularly ſtated in the Caſe of *Cowper* verſus *Lord Cowper* 2 Vol. 680.

The laſt Caſe was that of *Woodroff* and *Burton*, *February* 1719, and was thus:

A Deviſee brought his Bill againſt the Heir, and it being made to appear that there was ſuch a Will, as the Plaintiff had ſuggeſted, and that the Defendant had deſtroyed it, the Lord Chancellor *Parker* decreed the Defendant to convey the Premiſſes to the Plaintiff in Fee, and to deliver up the Poſſeſſion, which (*His Honour* ſaid) ſeemed to him to be the moſt effectual and reaſonable Decree.

But in the principal Caſe the Court ſaid, there could be no Decree for the Poſſeſſion, nor any preſent Conveyance to the Plaintiff, it being only a Remainder of a Term after the Defendant's Death; but let the Defendant aſſign over the Term to Truſtees, in Truſt for herſelf for Life, and afterwards for the Plaintiff; and let her bring the Deeds relating to the Title into Court, and pay Coſts.

Caſe 211. *Lord Chancellor* Macclesfield. On a Bill to ſet aſide a Decree againſt an Infant for Fraud, if the ſame be not Fraudulent, tho' in every Reſpect not ſo equitable, the Court will not ſet it aſide.

Richmond & *ux'* verſus *Tayleur*.

THE Plaintiff brought this Bill for the Wife's Portion: The Caſe was, that upon the Marriage of the Plaintiff's (Mrs. *Richmond*'s) Father *James Tayleur* with *Elizabeth*, the Daughter of *Anthony Wallinger*, 1500 *l.* was the Mother's Portion, to which the Father added 1000 *l.* and by Articles, to which the ſaid *Anthony Wallinger* was a Party, it was agreed that the Wife's 1500 *l.* and the Husband's 1000 *l.* ſhould be laid out in the Purchaſe of Land, within a Year after the Marriage, which ſhould be ſettled to the Uſe of *James Tayleur* the Husband for his Life, Remainder to *Elizabeth* the Wife for her Life, Remainder to the firſt, &c. Sons of the Marriage ſucceſſively in Tail

Male, Remainder to Truſtees for 1000 Years, to raiſe Portions for the Daughters of the Marriage, if no Son, (*viz.*) If but one Daughter, 1000 *l.* if two, 1500 *l.* betwixt them, if more, 500 *l.* a-piece. Proviſo, that if before the Money laid out in the Purchaſe, the Plaintiff's Father and Mother, (*viz.*) *Tayleur* and his Wife, or either of them ſhould die, leaving Iſſue only one Daughter, then that Daughter ſhould have the whole 2500 *l.* Alſo the Husband *Tayleur* covenanted, that if his intended Wife ſhould die before him, he would leave, after his Death to the Iſſue of the Marriage 500 *l.* beyond what was before ſettled.

In 1689 the Marriage betwixt the Plaintiff's Father and Mother was ſolemnized, and in 1695 the Plaintiff's Mother (Mrs. *Tayleur*) died, leaving Iſſue only the Plaintiff, now married to the other Plaintiff *Richmond*, which Marriage he gained * by corrupting the Servant, and without the Father's Conſent, having himſelf no Eſtate, and becoming a Bankrupt within a Year after the Marriage.

The Plaintiff's Father (*James Tayleur*) after the Death of his Wife, brought a Bill againſt his Daughter the now Plaintiff, and her Grandfather *Anthony Wallinger*, (who was a Truſtee in the Articles) praying that he might be relieved againſt the Lapſe of Time, for that the Purchaſe with the 2500 *l.* was not made within a Year, and that his Daughter might not claim the Whole after his Death; that he was willing to lay out the 2500 *l.* in a Purchaſe, but inſiſted that his Daughter ought not to have more than ſhe would have had, if the Purchaſe had been made in the Mother's Life-Time.

Anthony Wallinger the Father of *Tayleur*'s late Wife, and Grandfather of the now Plaintiff the Infant, by his

---

* See this ſtated in the Caſe of *Jacobſon* verſus *Williams*, ante 382.

Anſwer, allowed it to be hard that *Tayleur* ſhould be obliged to leave the whole 2500 *l.* to his Daughter after his Death; that *Tayleur* had been from Time to Time inquiring after a Purchaſe, and that it was not through his Neglect a Purchaſe had not been made. After which the Cauſe was heard by Conſent, and an abſolute Decree made (without giving the Infant a Day to ſhew Cauſe to the contrary) whereby it was directed that the 2500 *l.* ſhould be laid out in a Purchaſe of Land to be ſettled in the ſame Manner as if the Purchaſe had been made in the Mother's Life-Time, by which the Daughter would have been entitled to the 1000 *l.* and the 500 *l.* only, and it was referred to the Maſter to ſee the Purchaſe and Settlement made; accordingly the Maſter did approve of a Purchaſe, and of the Settlement thereof, whereby 1000 *l.* and 500 *l.* was ſecured to the now Plaintiff the Daughter, on the Father's Death. Afterwards *Tayleur* the Father married again, and left ſeveral Sons.

And now the Plaintiffs, *Richmond* the Husband and his Wife, brought their Bill, ſuggeſting that this Decree was gained by Fraud and Colluſion, and ought to be ſet aſide, and the whole 2500 *l.* paid to him.

The Defendants at firſt pleaded the Decree and Report; but the Plea being over-ruled, they inſiſted upon them by their Anſwer.

Lord Chancellor: The Articles are blindly penned; however, the Plaintiff's Bill is grounded upon the Fraud and Colluſion made uſe of in obtaining the former Decree againſt his Wife, then a tender Infant; and if any Fraud or Surpriſe upon the Court had been proved, I would have ſet aſide the Decree; but on the contrary, it appears that the Court was fairly and fully appriſed of the

Caſe, of the Articles, and of the Point in Queſtion, *viz.* the Lapſe of Time, and hath thought fit to make a Decree, which, as it may be a juſt one, therefore I will not ſet aſide. And the Plaintiff having been a Bankrupt, obtained his Wife in Manner as above, and not being able to maintain her, let the 1500 *l.* and Intereſt ſince the Father *Tayleur*'s Death be brought before the Maſter, the Intereſt thereof to be applied for the Maintenance of the Wife and Child, with Liberty to the Wife or Child to apply, if the Husband dies.

An Infant aggrieved by a Decree not bound to ſtay till he is of Age, but may apply as ſoon as he thinks fit to reverſe it, and may do this either by Bill of Review, Rehearing or by Original Bill, alledging ſpecially the Errors in the former Decree.

Note; In this Caſe it was held, that where an Infant conceives himſelf aggrieved by a Decree, he is not under a neceſſity to ſtay till he comes of Age before he ſeeks Redreſs, but may apply for that Purpoſe as ſoon as he thinks fit; neither is he bound to proceed by way of Rehearing or Bill of Review, but may impeach the former Decree by an Original Bill, in which it will be enough for him to ſay the Decree was obtained by Fraud and Colluſion, or that no Day was given him to ſhew Cauſe againſt it; and Mr. *Cottingham* (his Lordſhip's Secretary) acquainted the Court that Mr. *Vernon*, in Caſe of an erroneous Decree againſt an Infant, uſed always to adviſe the bringing of an original Bill to ſet it aſide, but in ſuch Bill to alledge ſpecially the Errors in the former Decree.

Orlebar verſus *Fletcher and the Duke of Kent.*

At the Rolls.

Caſe 212.

A Trader ſeiſed of Lands in Fee gives Judgment to *B.* and then ſells the Land to *C.* and afterwards becomes a Bankrupt; though the Judgment Creditor cannot come in for more than his Proportion with the Bankrupt's Creditors, whether he may not extend the Lands in *C.* the Purchaſer's Hands, *C.* having purchaſed before the Bankruptcy, and this not prejudicing the Creditors. So if *A.* the Trader gives Judgment to *B.* and articles for a valuable Conſideration to ſell to *C.* and then becomes a Bankrupt, it ſeems the Judgment ſhall bind the Lands in the Hands of *C.* who articled to buy them; but whatever Money the Purchaſer was to pay the Bankrupt, the ſame ſhall be liable to the Bankruptcy.

IN *February* 1716, the Defendant *Fletcher* being ſeiſed in Fee of ſome Lands in *Bedfordſhire*, borrowed 1500 *l.*

1500 *l.* of the Plaintiff *Orlebar* (one of the Maſters in Chancery) on a Judgment. Afterwards, (*viz.*) *Auguſt* 20. 1717, the Defendant *Fletcher* articled with the other Defendant the *Duke of Kent*, to ſell the Premiſſes to the *Duke*, in Conſideration of 5000 *l.* to be paid down, and 650 *l.* to be paid at *Chriſtmas* then next, the Duke to be let into Poſſeſſion at *Michaelmas*; ſubſequent to which Tranſactions, the Defendant *Fletcher* becoming a Bankrupt, the Plaintiff Mr. *Orlebar* brought his Bill againſt the *Duke of Kent*, *Fletcher* the Bankrupt and the Aſſignees under the Commiſſion, praying that the 650 *l.* remaining in the *Duke of Kent*'s Hands, might be paid to the Plaintiff, towards Satisfaction of his Judgment.

Upon the Opening of the Cauſe the *Maſter of the Rolls* obſerved, that by the Statute of 21 *Jac.* 1. *cap.* 19. *ſect.* 9. it is provided, "That Creditors by Judg-
" ment, Statute or Recognizance, whereof no Extent
" is ſerved or executed on a Bankrupt before his Bank-
" ruptcy, ſhall not be relieved for more than a ratable
" Part of their juſt Debt."

To which I replied, that the Words [ſhall not be relieved for more, *&c.*] imported only, *that they ſhould not have Relief upon the Commiſſion*; * but if they could extend the Defendant's Land, they were to be left at Liberty; that the Statute only reſtrained the Judgment Creditor from proceeding againſt the Perſonal Eſtate of the Bankrupt; but as to the Real Eſtate upon which the Judgment was an actual and veſted Lien, it could never have been the Intention of the Parliament, to deveſt a Creditor of this Right; beſides, the other Words of the Statute [without Regard had to the Penalty] might intend this Clauſe to be ſatisfied by relieving againſt the Penalty.

---

* See the Caſe of Sir *George Newland* and *Beckley* verſus ----, ante 92.

However, the Court interrupted me while I was ſpeaking to this Point, and ſaid this was attempting to diſturb what was already ſettled; that it had been determined at Law, that where a Judgment was not ſerved or executed, the Cognizee thereof ſhould only come in *pro ratâ* with the other Creditors of the Bankrupt.

Then I urged that theſe Articles by *Fletcher* before his Bankruptcy, to ſell the Land to the *Duke of Kent*, eſpecially when the *Duke* had paid the greateſt Part of the Purchaſe Money and was in Poſſeſſion, were as a Sale in Equity: That if a Trader ſeiſed of Land in Fee, ſhould confeſs a Judgment to *A.* and then ſell the Land to *B.* and afterwards become a Bankrupt, though *A.* the Judgment Creditor could not come in upon the Bankrupt's Eſtate for any more than his Proportion with the other Creditors, yet he would be at Liberty to extend his Judgment againſt the Purchaſer, who bought the Land prior to the Bankruptcy; which ſeemed to be admitted.

But in the principal Caſe the Court ſaid, that the *Duke of Kent* could not be deemed a Purchaſer, until he had paid the 650 *l.* which, remaining in the *Duke*'s Hands, was Part of the Perſonal Eſtate of the Bankrupt, and muſt be liable to his Creditors; that the Duke was not to be compelled to pay it unleſs upon his having a good Title, which was to be made him by the Aſſignees of the Commiſſion of Bankruptcy, who had the legal Eſtate of the Premiſſes aſſigned to them by the Commiſſioners.

Wherefore *per Cur'*: Let the Aſſignees convey the Premiſſes in Fee to the *Duke of Kent*, in the ſame Manner as the Bankrupt had articled to do, they ſtanding in his Place, and in Conſideration of this, let his

Grace pay the 650 *l.* the Remainder of his Purchaſe Money to the Aſſignees for the Benefit of the Creditors; and as to the Plaintiff Mr. *Orlebar*, the Judgment Creditor, he muſt come in for a Proportion only with the reſt of them.

Caſe 213.

Lord Chancellor Macclesfield.

Longford verſus *Eyre.*

A Witneſs proving a Will of Land, ſwears that he ſubſcribed it in the ſame Room, and at the Teſtator's Requeſt; held good, tho' not ſaid in the Teſtator's Preſence.

THE Lady *Clutterbuck*, before her Marriage with Mr. *Rumſey* of *Briſtol*, did, with his Conſent, convey her Eſtate to Truſtees to ſuch Uſes and for ſuch Eſtates as ſhe ſhould by Deed or Will, or by any Writing in the Nature of a Will, appoint. Having afterwards married Mr. *Rumſey*, ſhe made her Will, and thereby deviſed theſe Lands; there were four Witneſſes to the Will, one of whom was gone beyond Sea, two ſwore that they ſaw the Will executed by the Teſtatrix, and that they ſubſcribed the ſame in the Preſence of the Teſtatrix; the third ſwore that he ſubſcribed the Will as a Witneſs in the ſame Room, and at the Requeſt of the Teſtatrix.

The Lord *Cowper* (before whom the Cauſe was firſt heard) doubted as to the Proof of the Execution of this Will, but would declare no Opinion on the Point until farther Application, ſaying, that the Heir at Law, who was then an Infant, might by that Time come of Age. And now this Matter coming on again before the Lord *Macclesfield*, it was urged, 1*ſt*, That the Witneſs ſubſcribing this Will in the ſame Room with the Teſtatrix, was the ſame as in her Preſence; nay, it had been reſolved in Sir *George Shiers*'s Caſe (*a*) that though the Witneſſes ſubſcribed their Names to the Will in another Room, yet there happening to be a Window in that Room, through which the Teſtator might ſee them, it was well enough. 2*dly*, It was inſiſted, that if

(*a*) Salk. 688.

if the Will was not good as ſuch, yet this was a Writing in Nature of a Will; and foraſmuch as the Appointee in this Caſe was not in by the Will or Writing of Appointment, but by the original Conveyance, the Writing in Queſtion would be a good Appointment, though not a good Will.

Lord Chancellor: The proper Way of examining a Witneſs to prove a Will as to Lands, is, that the Witneſs ſhould not only prove the Executing the Will by the Teſtator, and his own Subſcribing it in the Preſence of the Teſtator, but likewiſe that the reſt of the Witneſſes ſubſcribed their Names in the Preſence of the Teſtator; and then one Witneſs proves the full Execution of a Will, ſince he proves that the Teſtator executed it; and likewiſe that the three Witneſſes ſubſcribed it in his Preſence.

A Witneſs to prove a Will of Land, ought to prove that the Will was executed in his Preſence, and alſo in the Preſence of the two other Witneſſes, and that they ſubſcribed in the Preſence of the Teſtator.

But this is not done in the principal Caſe.

2*dly*, He held that the bare Subſcribing the Will by the Witneſſes in the ſame Room did not neceſſarily imply it to be in the Teſtator's Preſence: For it might be in a Corner of the Room, in a clandeſtine fraudulent Way; and then it would not be a Subſcribing by the Witneſs in the Teſtator's *Preſence*, meerly becauſe in the ſame Room; but that here it being ſworn by the Witneſs, that he ſubſcribed the Will at the Requeſt of the Teſtatrix, and in the ſame Room, this could not be fraudulent, and was therefore well enough.

3*dly*, *His Lordſhip* much doubted, whether this Will would have been a good Appointment, had it not been executed purſuant to the Statute of Frauds; becauſe when a Power is given to appoint the Uſes of Land by

Power to appoint an Uſe of Land by Deed or Will. A Will atteſted by two Witneſſes not a good Appointment; becauſe in ſuch Caſe *by a Will* muſt be intended ſuch a Will as is proper to diſpoſe of Land. So though the Words are, *or other Writing in Nature of a Will.*

(*a*) Vide *Wagſtaff* verſus *Wagſtaff*, 2 Vol. 258.

Deed or Will, the Will muſt be intended (*a*) ſuch a one as is proper for the Diſpoſition of Land; conſequently ſubſcribed by three Witneſſes in the Preſence of the Teſtator; for this is within all the Inconveniencies that the Statute of Frauds intended to prevent, and the other Words *in the Nature of a Will* mean the ſame as a Will, which muſt therefore be ſubſcribed by Witneſſes in the Preſence of the Teſtator. But for the Reaſons aforeſaid it was declared this was a good Will both as to the real and perſonal Eſtate.

Caſe 214.

Lord Macclesfield.

On a Bill in Equity being abated by Death, the Executor or Adminiſtrator barred by Statute of Limitation, if they do not revive withn Six Years; but not after a Decree to account.

Hollingſhead's Caſe.

A. Is Partner with *B*. in the Trade of a Mercer. *A*. dies inteſtate, and *C*. his Adminiſtrator brings a Bill in Equity againſt *B*. for an Account of the Partnerſhip Effects. Whereupon the Cauſe is heard, and an Account being decreed, the Maſter makes a Report, by which it appears, that there is nothing due from the Defendant to the Plaintiff. *C*. takes Exceptions to the Maſter's Report, and then dies, and the now Plaintiff having taken out Adminiſtration *de Bonis non* of *A*. brought his Bill of Revivor to revive theſe Proceedings.

The Defendant pleads the Statute of Limitations, and that above Six Years had paſſed after the Death of the firſt Adminiſtrator and the Plaintiff's taking out Letters of Adminiſtration, before the filing of the Bill of Revivor.

For the Plaintiff it was argued, 1*ſt*, That the Statute of Limitations was an improper Plea in this Caſe; that praying to revive was praying to ſtand in the Place of the firſt Plaintiff, which the Plaintiff when he had revived would do, and conſequently would not be barred

red by the Statute of Limitations, ſince it was not pretended but that the firſt Suit was brought in Time. *Secondly*, That a Decree of the Court of Chancery was in Nature of a Judgment; and it could not be thought a Judgment was within the Statute of Limitations: For even a Specialty was not; and a Decree, though only to account, was ſtill a Decree. 3*dly*, That there was no Reaſon this Caſe ſhould be taken as within the Statute of Limitations, becauſe the Defendant in the Caſe of an Account (where each Side are Actors) if he thought fit, might revive, and ſo the Delay of the Plaintiff not to be objected by the Defendant in whoſe Power it was to have prevented any ill Conſequence ariſing therefrom.

Attorney General Raymond *contra*: It is true, when the Plaintiff has revived, he ſtands in the Place of the Plaintiff in the original Bill; but this Plea is pleaded in Bar of Reviving, and until then the Plaintiff does not ſtand in his Place; and we may well object, that by the Statute of Limitations he ought to have come ſooner; to which the Court ſeemed to incline. As to the ſecond Objection, he obſerved, that this Decree being only to account, was but interlocutory, and it did not appear by ſuch Decree that one Farthing was due from the Defendant to the Plaintiff; ſo that it eſtabliſhed no Debt, nor was it Evidence of the Plaintiff's having any juſt Cauſe of Suit. With Regard to the third Objection, he admitted either Side might revive in this Caſe; but it would be hard to put the Defendant to revive a chargeable Suit againſt himſelf, when he might be ſatiſfied in his Conſcience that nothing was really due, and here was Room for the Court to intend ſo in this Caſe, when the Maſter, after examining into the Matter, had reported nothing due; and though by Exceptions being put in to the Report, ſuch Report was ſuſpended, yet the Plaintiff ſhould not have ſlept Six Years after the Adminiſtration taken out.

Lord Chancellor: The Statute of Limitations ſpeaks nothing of Bills in Equity, yet theſe are conſtrued to be within it. The Caſe of not reviving a Decree which is only to Account, is within all the Miſchief deſigned to be prevented, *viz.* to ſue a Man after his Vouchers may have been loſt, or his Witneſſes dead. For if the Party may delay Six Years before he revives his Bill, he may by the ſame Reaſon forbear twenty-ſix, thirty-ſix or forty-ſix Years. There can be no Doubt but that if this were only a Bill and Anſwer, and the Suit abated, the Executor muſt bring his Bill of Revivor within Six Years, elſe the Suit would be barred. Now the Reaſon holds ſtill as ſtrongly in caſe of a Decree to account, which is in Nature of a Judgment *Quod computet*; where, if the Plaintiff had died, his Executor or Adminiſtrator could not formerly carry it on, as now by the late Statute he may; and though it may ſeem a material Objection, that when there is a Decree to account, the Defendant as well as Plaintiff may revive; it would however be very hard for Equity to force a Man to revive a Suit againſt himſelf at the ſame Time that he ſwears he owes nothing.

Therefore let the Plaintiff amend his Bill, and the Defendant his Anſwer, to bring the Matter more fully before the Court.

After which the Defendant died, and one *Beecher* adminiſtring to him, the Plaintiff brought another Bill of Revivor; whereupon the Defendant *Beecher* pleaded the Statute of Limitations, and coming to be argued before Lord Chancellor *King* in *Mich.* 1727, his Lordſhip diſallowed the Plea, ſaying that a Bill of Revivor

after

after a Decree to account, was in Nature of a *Sci. Fa.* and not within or barrable by the Statute of Limitations; though the Demand ſeemed to be a very ſtale one, and not to be countenanced.

Savile verſus *Savile.*

Caſe 215. *Lord* Macclesfield. Purchaſer before a Maſter ſubmitting to forfeit his Depoſit, not bound to proceed in the Purchaſe.

IN this Cauſe there was a Decree (*inter al.*) for the Sale of *Halifax-Houſe* in St. *James*'s *Square* to the beſt Purchaſer before the Maſter, and *Thomas Frederick* Eſq; was reported the beſt Bidder at 10500 *l.* having made 1000 *l.* Depoſit.

On the Days of Petitions after *Hillary* Term it was prayed, that Mr. *Frederick* might compleat his Purchaſe, and pay the Remainder of the Purchaſe-Money; upon which Mr. *Frederick* by his Counſel declared that he elected to loſe his Depoſit.

But the Lord *Nottingham* Grandfather and Guardian to the young Ladies the Plaintiffs (who were the Daughters and Coheirs of *William* late Lord Marquis of *Halifax* by Lady *Mary Finch*) inſiſted, that Mr. *Frederick* being the beſt Bidder ought to pay the Reſidue of the Purchaſe-Money, and being preſent himſelf urged, that this Contract, ſince it was made with the Court in Truſt for the Plaintiffs, could not (as he thought) be diſcharged upon any other Terms, than Payment of the Reſidue of the Purchaſe-Money: That had it been the Caſe of a private Contract between Party and Party, and ſo much Money paid as Earneſt, there could be no Reaſon to imagine, that becauſe the intended Purchaſer paid ſo much by way of Earneſt, therefore he ſhould be at Liberty to get off from the Bargain by loſing his Earneſt; and ſurely the Contract made with the *Court* was at leaſt as ſtrong as if made with the *Party*: That if there had been no Depoſit, it would hardly have been a Queſtion but that the Party ſhould have been compelled to pay the whole Purchaſe-Money, and could it be imagined that the Contract was the weaker becauſe there was a Depoſit? This would be inverting the very Senſe and Meaning of the Parties, and to conſtrue that a Depoſit ſhould weaken inſtead of ſtrenghtening the Contract: That forfeiting the Depoſit was ſurely the moſt unequal Way that could be; for it made no Alteration, whatever the Depoſit was, whether greater or ſmaller; and therefore in the Caſe of *Morrett* verſus *Bennett* *, where the Depoſit was Ten Thouſand Pounds, the whole Depoſit was forfeited, and if in that Caſe it had been but *One* Thouſand Pounds, yet only ſo much as had been depoſited could be forfeited; from whence it ſeemed, that as the Depoſit might bear a very great Diſproportion to the Value of the Eſtate, it could conſequently be no proper Meaſure of Satiſfaction to the Seller, for the Buyer's receding from his Contract; that as the Seller was bound to ſell, ſo ought the Tye to be mutual upon the Buyer alſo.

Lord Chancellor took notice that more had been urged by the Lord *Nottingham* than he had ever heard on this Subject, but that he had taken good Advice and well conſidered before he made the like Order in the other Caſes: That according to his Apprehenſion, a Court of Equity ought to take notice under what a general Deluſion the Nation was at the Time when this Contract was made by Mr. *Frederick*, when there was thought to be more Money in the Nation than there really was, which induced People to put imaginary Values on Eſtates: That as upon a Contract betwixt

---

* Determined in this Court ſome little Time before: As was alſo the Caſe of Dr. *Tenniſon* verſus Lord *Bulkley*; in both which Caſes the beſt Bidders upon loſing their Depoſits were diſcharged of their Contracts.

Party and Party, the Contractor would not be decreed to pay an unreaſonable Price for an Eſtate, ſo neither ought the Court to be partial to itſelf, and do more upon a Contract made with itſelf, or carry that farther, than it would a Contract betwixt Party and Party. On the other Hand the Court might be ſaid to have rather a greater Power over a Contract made with *itſelf* than with any *other*.

That the Depoſit was ſuppoſed to be a proper Pledge for ſecuring the Seller in caſe the intended Purchaſer ſhould afterwards go off; and had it not been ſufficient, the other Side might have moved to have ſuch Depoſit increaſed; but being thought a ſufficient Pledge, it was Puniſhment enough if the Party that made it was to loſe it, and Satisfaction enough to the Seller, if he was to have the Benefit of keeping the Depoſit: That in this Caſe the Depoſit was near a Tithe of the Purchaſe-Money; ſo that if the Seller could get as much within 1000 *l.* of any other Purchaſer, he would be no Loſer; and if he could not get ſo much within 1000 *l.* then it would appear to be dear ſold; and conſequently a Bargain not fit to be executed by this Court: That the Court had made ſeveral Orders in Caſes of this Nature, attended with ſtronger Circumſtances; as where the Eſtates were greatly incumbred, and the Creditors would loſe their Debts if the Bargains did not proceed; but an Hardſhip ought not to be decreed againſt one, in order to prevent it's falling upon another: And if thoſe Orders ſhould be diſcharged, whereby others got off from Contracts by loſing their Depoſits, it would make great Confuſion, and their Money muſt be brought again into Court. The beſt Way certainly was, for the Court to be uniform in it's Reſolutions.

Wherefore it was ordered that Mr. *Frederick* ſhould loſe his Depoſit of 1000 *l.* and be diſcharged of his Contract.

Caſe 216.

Lord Macclesfield.

Pleydell Widow and Executrix of John Pleydell, } *Plaintiff;*

Randolph Pleydell and Champneys Pleydell, } *Defendants.*

Deviſe of 400 *l.* to *A.* and if *A.* die without Iſſue, then to *B.* this is good and muſt be intended, if *A.* die without Iſſue living at his Death.

THE Plaintiff's Bill (*inter al.*) was to have the Direction of the Court touching two ſeveral Sums of 400 *l.* and 400 *l.* deviſed by the Will of *John Pleydell* her late Husband.

The Caſe was thus: *John Pleydell* having no Iſſue by the Plaintiff *Elizabeth* his Wife, had two Brothers, the Defendants *Randolph* and *Champneys Pleydell*, and by Will dated *May* 1719 gave all his Money and Securities for Money to the Defendants his ſaid Brothers in Truſt to pay 200 *l.* to his Wife abſolutely, and to pay the Intereſt of all the reſt of his Money to his Wife for her Life. After her Death he gave the Intereſt of 400 *l.* Part of the Reſidue, to his Brother *Randolph Pleydell* for his Life, then to his firſt Son, payable to him until he ſhould attain his Age of 21; at which Time he was to be paid the principal Sum of 400 *l.* But if ſuch eldeſt Son ſhould die before his Age of 21, then the Teſtator deviſed the Intereſt of the ſaid 400 *l.* to the ſecond Son of the ſaid *Randolph Pleydell* until his Age of 21, and then to pay him the principal Sum of 400 *l.* and in caſe of his Death before 21, to the third, fourth, &c. Sons of the ſaid *Randolph Pleydell* in like Manner. He alſo gave the Intereſt of another Sum of 400 *l.* to his

ſaid

ſaid other Brother the Defendant *Champneys Pleydell* for his Life; and after his Death the Intereſt to go to the firſt Son of this *Champneys* until his Age of 21, when the principal Sum was to be paid him: But if it ſhould happen that his firſt Son ſhould die before his Age of 21, then the Intereſt to be paid to the ſecond Son of *Champneys* until his Age of 21, at which Time the principal Sum of 400 *l.* was to be paid to ſuch ſecond Son; but if he ſhould die before 21, to the third Son. After which came a Clauſe, "That if either of the ſaid "Teſtator's Brothers (the Defendants *Randolph* or *Champneys Pleydell*) ſhould die without Iſſue, in ſuch Caſe "his Share was to go to the Teſtator's right Heirs". And the Teſtator made his Wife Executrix and Reſiduary Legatee.

The Cauſe was heard before the *Maſter of the Rolls*, who decreed, that as to the ſaid two Sums of 400 *l.* and 400 *l.* if the Defendants *Randolph* and *Champneys Pleydell* ſhould die without Iſſue *living at their Death*, then the Share of him or them ſo dying ſhould belong to the right Heir of the Teſtator *John Pleydell*, and not to the Plaintiff *Elizabeth* the Executrix; but if it ſhould happen that the Defendants *Randolph* and *Champneys Pleydell* ſhould die, leaving Iſſue, which Iſſue ſhould alſo die before the Age of 21, in ſuch Caſe theſe Shares ſhould ſink into the *Reſiduum* of the Teſtator's Perſonal Eſtate.

From this Decree the Plaintiff appealed to the *Lord Chancellor*, inſiſting that if either of the Defendants *Randolph* or *Champneys Pleydell* ſhould die without Iſſue, his 400 *l.* ſhould go to the Plaintiff the Executrix and reſiduary Legatee, and not to the Heir of the Teſtator *John Pleydell*; for that the Limitation of this 400 *l.* to the right Heir of the Teſtator after a Death without Iſſue, was too remote a Poſſibility in Caſe of a Limitation of Money, for which I cited 2 *Vent.* 349. *Broadhurſt* and *Richardſon*, and *Love* and *Windham*'s Caſe, *Sid.* 450. as alſo ſeveral others in (*a*) *Pollexfen*'s Reports.

(*a*) Vide from fol. 24. to fol. 44.

Lord Chancellor: There is a great Difference between a Limitation of a Truſt of a Term for Years in ſuch a Manner as that all Power of Alienation may be thereby reſtrained, and conſequently a Perpetuity introduced, and a Limitation of a Truſt of a Sum of Money, which may be ſubject to more remote Contingencies; for in the latter Caſe I ſhould think a Bond to pay a Sum of Money upon the Death of *A. B.* without Iſſue of his Body would be good (*b*), and for the ſame Reaſon the Truſt of Money limited upon ſuch Contingency would be allowed alſo. However, the Proviſo in the preſent Caſe muſt be taken and underſtood of a Death without Iſſue then living, which is the common Meaning of this Expreſſion. And though in Caſe of a Deviſe of Land to a Man, and if he die without Iſſue, then to *J. S.* this would give an Eſtate-Tail, *viz.* to the Iſſue of the Deviſee, and ſo ſucceſſively to the lateſt Poſterity, yet ſuch Conſtruction is contrary to the natural Import of the Expreſſion, and made purely to comply with the Intention of the Teſtator, which ſeems to be that the Land deviſed ſhould go to the Iſſue and their Iſſue to all Generations. But notwithſtanding this, it would be very ſtrange to put a forced Conſtruction upon Words contrary and repugnant to their uſual Import, and only to defeat the Deſign of the Teſtator, by fruſtrating that Eſtate which he intended to give.

(*b*) Vide the Caſe of *Pinbury* and *Elkin*, ante 566.

But whether this Remainder ſhall go to him that *is* (*a*) *now* right Heir of the Teſtator, or to ſuch as *ſhall be ſo* at the Time when either of the Defendants *Randolph* and *Champneys Pleydell* ſhall die without Iſſue then living, let the Conſideration thereof be reſpited till that Contingency happens, when it will be proper to make ſuch Heir a Party to this Bill.

(*a*) Vide 1 Vern. 35. *Danvers* verſus *Earl of Clarendon.*

Pollen

Pollen verſus *Sir John Huband & al'.*

Caſe 217.

Lord Macclesfield.

Equity will aſſiſt a Compoſition of a Debt, if obtained without Fraud, and upon a fair repreſentation.

THE Plaintiff was Executor and Deviſee in the Will of the late Sir *John Huband*, and received the Perſonal, together with the Rents and Profits of the Real Eſtate; but in a Suit in Equity touching the ſaid Will, being decreed to be but a Truſtee, he was ordered to account with the Defendant for what he had received of the Truſt Eſtate, and upon the Account was reported inbebted 4000 *l.* to the Defendant; afterwards on an Appeal to the Lords this Decree was affirmed. Whereupon *Pollen* ſtanding out all Proceſs of Contempt, fled beyond Sea, and while he was abroad, an Accommodation was ſet on Foot, by which it was agreed that *Pollen* ſhould pay a ſmall Sum to the Defendant Sir *John Huband*, who thereupon was to releaſe and indemnify him from the Creditors of the late Sir *John Huband*.

After this, *Pollen* being threatned with Suits by ſome of the Creditors brought his Bill for a ſpecific Performance of the Agreement, and that the Defendant ſhould, purſuant thereto, indemnify him againſt the Creditors of the late Sir *John Huband*.

Objected, That there was not ſufficient Reaſon in this Caſe to extend the Aid of a Court of Equity in Favour of *Pollen*, who had acted an ill Part throughout. 1*ſt*, in ſetting up a Title in his own Right, when he was but a Truſtee. 2*dly*, In turning his Back upon Juſtice and flying beyond Sea. 3*dly*, In putting the Defendants to Streights and Difficulties, by detaining their juſt Debts from them, and then taking Advantage of thoſe Difficulties in making them comply and take ſmall Sums in Satisfaction of much greater; for all which Reaſons it was ſaid to be very proper to leave the Plaintiff to make the moſt at Law of his Compoſition, but not to give him the leaſt Aid in Equity.

Lord Chancellor: It muſt be admitted to have been in the Power of Sir *John Huband* to make a Compoſition of this Demand, and to releaſe (if he had ſo pleaſed) the whole Debt. It was very lawful either for the Plaintiff to aſk a Compoſition, or for the Defendant Sir *John Huband* to grant it. Wherefore all that Equity ought to guard againſt is, only that no Fraud be uſed in obtaining the Releaſe or Compoſition; but this Caſe is ſtronger, as it was the Defendant Sir *John Huband* who firſt propoſed and deſired the Plaintiff to come into the Compoſition; on the other Hand *Rawlins* the Agent of *Pollen* put every Thing in a true Light, and the Defendant *Huband* declared he did not deſire to drive the Plaintiff from his Family and Country. Beſides, *Pollen* having got out of the Reach of Juſtice, it might be for the Benefit of the Defendant to accept of this, though a ſmall Compoſition. So that there being a fair Repreſentation on the Plaintiff's Side, and a juſt Compliance by the Defendant, and in a great Meaſure executed by the Plaintiff, Let the Defendant Sir *John Huband* execute his Part of the Agreement and indemnify the Plaintiff againſt the Debts of Sir *John Huband* the Teſtator.

Caſe 218.

Lord Macclesfield.

Humphreys verſus *Ingledon.*

Executor cannot bring a Bill without ſhewing thereby that he has proved the Will in the Spiritual Court; if he does, this is good Cauſe of Demurrer. But it is enough to alledge he has duely proved the Will, without ſaying in what Court. See Caſe 220.

ONE brings a Bill as Executor for the Recovery of ſome of the Teſtator's Aſſets, wherein it does not appear that he has any ways proved the Will; the Defendant demurs, in Regard the Plaintiff has not ſhewed by his Bill, that he has in any Court proved his Teſtator's Will.

Lord Chancellor: The Plaintiff is very ſtiff, after having been told of this Slip by the Demurrer, not to amend his Bill, and if he does not prove the Will before he is allowed to proceed here, probably he never will; now as the Courts at Law never take Notice of a Will, (*a*) ſo as to allow the Executor to ſue upon it for any Perſonal Eſtate, until he has firſt proved it in the Spiritual Court, ſo it is very reaſonable to obſerve the ſame Rule in Equity; indeed in every other Reſpect, ſaving only as to the Liberty of ſuing, the Executor is compleatly ſo, before Probate; for Inſtance, he may aſſign or releaſe, but ought not to be allowed to ſue.

(*a*) See 767.

The Court aſked Mr. *Goldsborough* the Regiſter how the Courſe was as to this Point? Who anſwered, That the Plaintiff ought to alledge by the Bill that he had * duly proved the Will; but though he did not mention in what Court, it would be enough; whereupon the Demurrer was allowed.

* The Lord Keeper *North*, when he firſt came into this Court, was of Opinion, that a Plaintiff Adminiſtrator ought to ſhew by his Bill where he had taken out Adminiſtration, to the Intent the Defendant might be informed in what Court to look for it, which might be void, if taken out under a wrong Juriſdiction; yet of late the general Allegation of having duly taken out Adminiſtration, has been held good, eſpecially where (as on Demurrer) the Cauſe is not then to be determined, but the Plaintiff muſt ſhew his Letters of Adminiſtration at the Hearing. So ſaid and determined by the Lord *King* in the Caſe of *Stone* verſus *Baker*, the 13th of *December* 1732.

Quære, Whether there is any Difference, as to this Point, between an Adminiſtration and an Executorſhip.

Attorney General, at the Relation of Folkes and Battely. } *Appellants;*

Sutton and Payman, *Reſpondents.*

(*In Domo Procerum.*)

Caſe 219.
One ſeiſed of ſome Lands in Fee, and being *Ceſtuy que Truſt* of other Lands, deviſes them to *A.* for Life Remainder to his firſt and ſecond Son in Tail Male, (going no farther) and after *A.*'s Death without Iſſue Male, then to a Charity. *A.* is Tenant in Tail until Iſſue born, ſaving as to the Truſt Eſtate.

THIS was an Appeal to the Houſe of Lords from an Order (*a*) made by the Barons of the *Exchequer*, by which they allowed the Reſpondents Plea to an Information brought for eſtabliſhing ſeveral Charities given by the Will of *John Sutton* out of ſome Lands in *Suffolk*, wherein the Teſtator had only the Truſt or equitable Intereſt, and out of the *Chequer-Inn* in *Holborn*, wherein he had the legal Eſtate; all which Charities were to take Effect upon the Death of the Teſtator's Nephew *Thomas Sutton* without Iſſue Male of his Body.

The Plea to this Information was, "That *Thomas* "*Sutton* the Teſtator's Nephew being Tenant in Tail "by the Will, had ſuffered a Common Recovery, and "thereby barred the Charities."

The Reſpondents claimed under the Recovery; the Appellants under the Charities. And the Queſtion was, whether this Will gave an Eſtate Tail in the Premiſſes to *Thomas Sutton* the Teſtator's Nephew?

This Caſe was argued at the Lords Bar, on *Wedneſday* the 20th of *December* 1721, and on the Will was thus:

John Sutton the Teſtator, ſeiſed in Fee of the legal Eſtate of the *Chequer-Inn* in *Holborn*, and only of the

(*a*) Feb. 10. 7 Geo.

Truſt or equitable Eſtate of certain Lands in *Suffolk*, which he had formerly purchaſed in the Name of his Brother *Thomas Sutton*, and which on his ſaid Brother's Death, had deſcended to his Son (the Teſtator's Nephew) *Thomas Sutton*, by Will dated *July* 1696 charged all his Eſtate with the Payment of his Debts, and directed his Nephew and Truſtee *Thomas Sutton*, to convey his *Suffolk* Lands to the Uſe of his Will. Then he deviſed all his Lands in *Suffolk*, and the *Chequer-Inn* in *Holborn*, to his Nephew *Thomas Sutton* for Life, and afterwards to the firſt Son, or Iſſue Male of his Body lawfully to be begotten, and to the Heirs Male of the Body of ſuch firſt Son, Remainder to his ſaid *Nephew*'s ſecond Son, and his Iſſue Male in Tail, (not carrying the Limitations over to his third or other Sons) and afterwards came this Clauſe, (*viz.*) That immediately after the Death of the Teſtator's Nephew *Thomas Sutton without Iſſue Male of his Body*, the Premiſſes ſhould go to Truſtees for Charities.

Thomas Sutton the Nephew ſuffered a Recovery and died without Iſſue, upon which, whether the Recovery barred the Charities, was the Queſtion?

For the Appellants it was urged, that it was moſt manifeſtly the Intention of the Teſtator, that his Nephew *Thomas Sutton* (who was obſerved not to be Heir at Law to the Teſtator) ſhould have no greater Eſtate in the Lands in Queſtion, than for Life only; and accordingly the Eſtate was expreſly limited to him *for and during the Term of his natural Life*, with Remainders to his Sons as Purchaſers; that it could not be pretended there were any Words in this *Will*, which could Poſſibly in a *Deed* have created an Eſtate-Tail in *Thomas Sutton*; if therefore any ſuch was created, it muſt be by Implication or Preſumption of the Teſtator's Intention, and not by the legal Import or Conſtruction of the Words themſelves; but ſuch an Implication was moſt directly contrary to the expreſs Declaration of the Teſtator in almoſt every Branch of the Will, as well as deſtructive of the Charities intended by him to be eſtabliſhed for ever. That the Will (particularly as to the Lands in *Suffolk*, the legal Eſtate whereof was veſted in the ſaid *Thomas Sutton* in Truſt for the Teſtator) was only a Direction and Appointment in what Manner the Truſtee ſhould convey his Eſtate, ſo as beſt to anſwer his Intention; and no Conveyance thereof having ever been made by the Truſtee purſuant to ſuch Direction expreſly given for that Purpoſe in the Will, the Truſt ſtill remained to be carried into Execution by the Direction and Authority of a Court of Equity, which it was hoped would be ſo done as to give an entire Effect to the Intention of the Teſtator expreſſed in the ſeveral Limitations contained in the Will; and not in ſuch a Manner as would put it in the Power of the Truſtee, who ought to have purſued the Teſtator's Direction in the Eſtabliſhment of the Charities, to deſtroy them at once, and thereby render uſeleſs and ineffectual the greateſt Part of the Proviſions made by the Will.

That this Caſe was to be compared to that of Marriage Articles for ſettling Lands on the Huſband and Wife for their Lives, Remainder to the Heirs Male of the Body of the Huſband by the Wife, where the Court in ordering the Settlement would vary from the Words of the Articles, and limit the Eſtate ſtrictly to the Huſband for Life, and afterwards to the firſt and every other Son.

Laſtly, That here were no Creditors or Purchaſers for a valuable Conſideration, who could be affected, were the Conſtruction contended for, to prevail.

I argued on the other Hand for the Reſpondents; This Caſe may be reduced to few Words, (*viz.*) one ſeiſed in Fee deviſes his Lands to his Nephew for Life, Remainder to his firſt and ſecond Son in Tail Male ſucceſſively, without carrying the Limitations farther to his other Sons; and after his ſaid Nephew's Death without Iſſue Male of his Body, then the Remainder over to Truſtees, for Charities.

The Queſtion is, Whether the Nephew (who never had any Iſſue Male) by ſuffering this Recovery has barred theſe Charities? and I humbly apprehend that he has.

I will begin *a Notioribus*, and from what every Body muſt admit: If I deviſe an expreſs Eſtate to *A.* for Life, Remainder to the Heirs of his Body, it can be no Queſtion, but that *A.* (notwithſtanding the expreſs Eſtate deviſed to him for Life) has yet an Eſtate-Tail veſted in himſelf; for it is a Rule to which every one muſt ſubmit, that in all Conveyances by Deed or Will, where an Eſtate for Life is limited with (*a*) Remainder mediately or immediately to the Heirs (or Heirs Male) of the Body of the Grantee or Deviſee; this veſts an Eſtate-Tail in ſuch Grantee or Deviſee, and the Words [Heirs, or Heirs Male of the Body] are Words of Limitation.

(*a*) Vide ante in *Hayter* verſus *Rod*, 371, and *Goodright* ver. *Wright*, 399.

My next Step ſhall be to ſhew that if I deviſe Lands to *A.* for his Life, Remainder to the *Iſſue Male* of the Body of *A.* this is an Eſtate in Tail Male to *A.* becauſe the Word [Iſſue] takes in all Iſſue proceeding from the Body of *A.* though for ever ſo many Generations and to the lateſt Poſterity. This was determined by all the Judges in the Exchequer Chamber, in Lord Chief Juſtice *Hale*'s Time, in the Caſe of *King* verſus *Melling*, 1 *Vent.* 214, 225. 2 *Lev.* 58. Where one deviſing Lands to *A.* for Life, Remainder to his Iſſue Male by his ſecond Wife, it was adjudged an Eſtate-Tail in *A.* and that his Recovery barred all the Remainders.

3*dly*, Where Lands are deviſed to *A.* for Life, and no expreſs Eſtate to his Iſſue or Iſſue Male, but it is only ſaid, in Caſe *A.* dies without Iſſue Male, then to *B.* in this Caſe by neceſſary Implication *A.* has an Eſtate-Tail; becauſe though he has an expreſs Eſtate for Life, yet it is as fully expreſſed in the Will, that until *A.* dies without Iſſue Male, *B.* ſhall take nothing; and therefore for mere Neceſſity, the Iſſue Male of *A.* after his Death muſt take the Lands; conſequently it is the ſame as if the Premiſſes were deviſed to *A.* for Life, Remainder to the Iſſue Male of *A.* which makes an Eſtate-Tail in a Will to *A.* in Caſe he at that Time had no Iſſue Male. And for this I would beg leave to cite 9 *Co.* 127, 128, (*Sunday*'s Caſe) where one deviſed his Lands to his Son *William*, and if his Son *William* ſhould have no Iſſue Male, then to the Teſtator's next Son; this gave an Eſtate in Tail Male to *William*; ſo in 1 *Vent.* 230. Lord Chief Juſtice *Hale* ſays, that the Words [In Caſe *A.* dies without Iſſue Male] give an Eſtate-Tail to *A.* to which Purpoſe his Lordſhip there cites *Burley*'s Caſe; and in 1 *Mod.* 54. in *Love* and *Windham*'s Caſe, it is ſaid by Chief Juſtice *Kelynge*, that in a Deviſe to *A.* for Life, and if *A.* die without Iſſue, then to *B.* theſe Words give *A.* an Eſtate-Tail.

The next thing to be conſidered is, whether the Limitations interpoſed to the firſt and ſecond Son of the Nephew *Thomas Sutton* in Tail Male, make any Alteration in the Caſe? Now plainly they do not; for by Virtue of the Words [after the Death of the Teſtator's Nephew without Iſſue Male of his Body] an Eſtate-Tail is created in *A.* and in Caſe he has Iſſue a Son, then that Eſtate which was before cloſed in him, ſhall open, to let in ſuch firſt Son to take. Thus was *Lewis Bowles*'s Caſe, 11 *Co.* 80. where a Man in Conſideration of Marriage covenanted to ſtand ſeiſed of the Premiſſes, to the Uſe of himſelf for Life, Remainder to the Uſe of the firſt Son of the Body of him and his Wife in Tail Male, Remainder to the ſecond Son in Tail Male, Remainder to every other Son of that Marriage in Tail Male, Remainder *to the Heirs of the Body of the Husband*; this was adjudged a veſted Eſtate-Tail in the Huſband, but that upon the Birth of a Son, the veſted Eſtate-Tail in the Huſband would divide, and let in the Remainder in Tail to the Son. So in the principal Caſe, until the Teſtator's Nephew *Thomas Sutton* had a Son, and while this was a Contingent Remainder as to ſuch Son, the Eſtate-Tail veſted in the Father.

But beſides what I have mentioned, there is a Caſe expreſs in Point, (*viz.*) that of (*a*) *Langley* verſus *Baldwin*, referred out of Chancery to the Judges of the Common Pleas, during the Time of the Lord *Trevor*'s Preſiding in that Court, where there was a Deviſe to *A.* for Life without Waſte, with a Power for him to make a Jointure, Remainder to his firſt, ſecond, and ſo to his ſixth Son, (and no farther) after which followed the ſame Words as here, If *A.* ſhould die without Iſſue Male of his Body, then to *B.* in Fee; and in that Caſe it was reſolved by all the Judges of *C. B.* that there being no Limitation beyond the ſixth Son, and for that there might be a ſeventh, who was not intended to be excluded, therefore to let in the ſeventh and ſubſequent Sons to take, (but ſtill to take as Iſſue and Heirs of the Body of *A.* in Tail by Deſcent and not Purchaſe) the Court held the Words [in Caſe *A.* ſhould die without Iſſue Male of his Body] did, in a Will, make an Eſtate-

(*a*) In May 1707. Vide ante 59.

Eſtate-Tail. This was a ſolemn Caſe adjudged in the very Point, and liable to all the Objections which can be made to the preſent one, (*viz.*) that there was an expreſs Eſtate for Life deviſed to *A.* notwithſtanding which, theſe Words [in Caſe *A.* ſhould die without Iſſue Male] were adjudged to give him an Eſtate-Tail.

Your Lordſhips will give me Leave to obſerve, that there is an apparent Difference between this Caſe of *Baldwin* and *Langley*, and that of (*a*) *Bamfield* and *Popham*, which is wrong reported in *Salk.* 236. for there the Deviſe was to *A.* for Life, Remainder to his firſt, &c. Sons in Tail Male ſucceſſively, extending to every Son that thereafter might be born of the Body of *A.* (ſo that if *A.* ſhould have had ever ſo many Sons, they all would have had a Poſſibility of taking) and then came the Words [and if *A.* ſhould die without Iſſue Male of his Body, then to *B.*] Here it was adjudged that theſe Words ſhould not make an Eſtate in Tail Male by Implication in *A.* becauſe there was no Occaſion for ſuch Conſtruction, ſince every Iſſue Male might take by the Deviſe to all the Sons in Remainder, ſo that the Words [in Caſe *A.* ſhould die without Iſſue Male] were to be intended *ſuch* Iſſue Male; and ſhould not, when vainly inſerted, and when they could not operate or be of Uſe, merge and deſtroy an expreſs Eſtate for Life; but in the principal Caſe, theſe Words have their Uſe, (*viz.*) to let in the Third and every other ſubſequent Son born to the Teſtator's Nephew *Thomas Sutton*, and therefore ſhall make an Eſtate-Tail by Implication in him. Beſides this Caſe is ſtill ſtronger from the particular penning of the Will, the whole Tenor whereof ſhews it to have been the Teſtator's Intent to give an Eſtate in Tail Male to *Thomas Sutton* the Nephew, it being ſaid in one Part of the Will, that if the Nephew ſhould refuſe or omit, within a Year, to convey the Truſt E-

(*a*) Ante 54.

ſtate in the *Suffolk* Lands (the legal Eſtate of which he was entitled to as Heir to the Teſtator's Brother and Truſtee) to the Uſes in the Will mentioned, then the Gift to him the ſaid Nephew, and the Heirs Male of his Body ſhould be void; which plainly ſhews that the Teſtator himſelf thought he had given the Premiſſes in Tail Male to his Nephew, by Words tantamount, or importing the ſame, as if given to him and the Heirs Male of his Body.

Again, the Conditional Proviſo annexed to the Deviſe *that he ſhould do no Waſte*, is an Argument he intended him an Eſtate-Tail; for if the Teſtator had given a bare Eſtate for Life, he, of courſe, could not have done Waſte, but had been puniſhable for it by the next Remainder-man in Tail or Fee. Alſo the other Proviſo that the Nephew *ſhould not alien, or endeavour to alien*, ſhews that the Teſtator intended him more than an Eſtate for Life, for otherwiſe he could not alien; but when the Teſtator recollected that he had given him an Eſtate-Tail by Virtue of which he had a Power to alien, he thought it neceſſary to annex a Condition which he might imagine a good one, and would really be ſo, to reſtrain a Feoffment and (*a*) Diſcontinuance, but not a Recovery.

(*a*) 1 Inſt. 123.

As for the Remainder to the Charity, that being ſubſequent to an Eſtate-Tail, was plainly at the Mercy of the Tenant in Tail to bar by a Recovery; for ſo are all Eſtates ſubſequent to an Intail, unleſs ſuch as are in the Crown, whether they belong to Charities, Infants or Feme Coverts; and if the Law were otherwiſe, the greateſt Inconvenience would follow, Perpetuities would be introduced, and it would become uſual in Settlements of great Eſtates, after a Limitation to all the Male Line, to give them to a Charity, by which Means a Perpetuity would be created, ſince none would buy if the Charity could not be barred. This was the Caſe of Sir (*a*) *Gilbert Gerrard* verſus *Godfrey Woodward*, where Sir *Gilbert* married one of the Coheireſſes of Sir *Thomas Spencer* of *Tarnton* in the County of *Oxford*; but the Eſtate being veſted in Truſtees for the Lady *Gerrard* in Tail, Remainder to a Charity, Sir *Gilbert* and his Lady ſuffered a Recovery to the Uſe of Sir *Gilbert* in Fee; and Sir *Gilbert* and his Wife afterwards dying without Iſſue, the Heir General, or Aſſignee of the Heir General of Sir *Gilbert*, brought a Bill in the *Exchequer* againſt the Truſtees and againſt the Charity, for a Conveyance of the Legal Eſtate, which the Court of *Exchequer* decreed accordingly, tho' to the utter Defeating of the Charity.

(*a*) See this Caſe cited 2 Vern. 428.

As to the laſt Point in this Caſe, that of the Truſt of the *Suffolk* Lands, it has been objected that, being only a Truſt, a Creature of Equity, and a Direction by the Teſtator to convey this equitable Intereſt, according to the Limitations in the Will, Equity will mould it in ſuch a Manner, as beſt to preſerve the Intentions of the Party, and have it ſo conveyed, as that the Nephew may never have it in his Power to bar either his own Sons or the Charity; that without Equity, neither the Nephew nor any other can come at the legal Eſtate, and for Equity to aſſiſt in deſtroying a Charity is ſaid to be hard. That Equity muſt do ſomething to Aid the Will, is plain; for if a Conveyance of the Truſt Eſtate were to be ordered in the very Words of the Will, ſuch Words, if in a Deed, will not convey an Eſtate-Tail to the Nephew, but there muſt be the Words [Heirs Male of the Body of the Nephew,] and this Will containing a Direction to convey, is inſiſted to be executory, and compared to Articles to ſettle Lands upon a Marriage on the Husband and Wife for their Lives, Remainder to the Heirs Male of the Body of the Husband by the Wife; in which

Caſe it has been adjudged, (and particularly in the great Caſe of (*a*) *Trevor* verſus *Trevor*) that when Equity is to order the Settlement, it will decree an Eſtate for Life to the Huſband, with Remainder to Truſtees to ſupport contingent Remainders, Remainder to the firſt Son, *&c.* in ſtrict Settlement, and not impower the Huſband to break it the very Moment it is made, which in the principal Caſe is urged to be the ſtronger, as here is no Purchaſer or Creditor likely to ſuffer by ſuch Conſtruction.

(*a*) Ante 622.

To which I anſwer, that were this the Caſe of Articles to ſettle Lands on Marriage on the Huſband for Life, Remainder to the Heirs Male of the Body of the Man by the Woman, the Conſtruction Equity would put upon it, would be, to have the Lands ſettled (after an Eſtate for Life to the Father) upon the firſt, *&c.* Son of the Marriage; but there is a wide Difference betwixt Articles and a Will. A Will is the voluntary Act and Diſpoſition of the Party, but Articles of Marriage are made upon a valuable Conſideration. In caſe of Articles, two Parties are contracting together, and making a Bargain, and come to have an Execution thereof decreed, under which Circumſtances the Court cannot do Juſtice, without going according to the Meaning of each Party. It is then a Thing in *Fieri*, and in its Nature perfectly executory; but in caſe of a Deviſe, though of a Truſt, yet it is to be conſtrued by the ſame Rules as where an Eſtate is deviſed, elſe it would breed the utmoſt Confuſion, none would know how to adviſe, or what Opinion to give on Wills, where very often the Truſt Eſtate is out of the Deviſor; it would be ſtrangely inconvenient if the Deviſee under the ſame Will, by the ſame Words, and in the ſame Clauſe too, ſhall at Law be Tenant in Tail, and in Equity conſtrued to be Tenant for Life only.

With regard to the directing Clauſe in the Will, that the Truſtees ſhould convey, that can be no Handle for a Court of Equity to make a different Conſtruction of a Deviſe of a Truſt, than it would of a Deviſe of an Eſtate; for every Deviſe of a Truſt implies a Direction to the Truſtees to convey the Premiſſes in Manner as the Will diſpoſes, *Et expreſſio eorum quæ tacitè inſunt nihil operatur*; and as the Remainder in Fee to the Charities, is admitted to be well barred with reſpect to the *Chequer-Inn*, wherein the Teſtator had a legal Eſtate, ſo was it intended by him that both ſhould go and be enjoyed together. In the Caſe of *Bale* and *Coleman* (*a*) decreed by Lord *Harcourt* in 1711, where a Man deviſed his Lands to Truſtees for Payment of his Debts and Legacies, and after ſuch Debts and Legacies paid, the Truſtees were directed by the Will to convey the Premiſſes to *A.* for Life, with Power to make Leaſes for 99 Years, Remainder to the Heirs Male of his Body, though this was but a Truſt and a Direction to convey, and though the Queſtion aroſe upon a Will, and an expreſs Eſtate was given to *A.* for his Life, with Power to make Leaſes for 99 Years; yet was it decreed, that an Eſtate-Tail paſſed by the Will to *A.* And in this Caſe the Court having taken a Diverſity between a Direction by a Will to convey and Articles in Conſideration of Marriage, held that in the latter Caſe only, Equity, which was to execute the Articles between the contending Parties, would go according to their Meaning and Intention, without having a ſtrict Regard to the Words.

(*a*) Ante 142.

Upon the whole, For theſe Reaſons, and in regard to ſo many and great Authorities, the Reverſing of which would ſhake the Titles of many Subjects of this Kingdom, I am to pray your Lordſhips that the Order of the Court of *Exchequer* may be affirmed.

Whereupon, after the withdrawing of the Counſel from the Bar, all the Lords agreed, that as to the *Chequer-Inn* wherein the Teſtator *Sutton* had a legal Eſtate, the Recovery was clearly good and barred the Charities;

But with regard to the Truſt Eſtate in the *Suffolk* Lands, and which the Will directed ſhould be ſettled to the ſame Uſes as the *Chequer-Inn* was deviſed, ſome of their Lordſhips doubted, that there being a Direction for the Truſtees to convey, this gave a Handle to a Court of Equity to interpoſe, and if the Court was to interpoſe, it was fit and reaſonable to help the Intention of the Party, which was but imperfectly expreſſed in the Will; that this Aſſiſtance ſhould be given in reſpect to the Remainder limited to the firſt and ſecond Sons of the Teſtator's Nephew *Thomas Sutton*, by ordering an Eſtate to Truſtees during the Life of the Nephew, and ſo to put it out of his Power to bar theſe Remainders to the firſt and ſecond Son; that none could blame the doing of this, which was an apparent Compliance with the Teſtator's Intent; and as the Charities were intended to take Effect in caſe only the Nephew ſhould die without Iſſue Male, it would be equally juſt to preſerve and aſſiſt ſuch Intention by limiting a Remainder to every other of the Sons of *Thomas Sutton* the Nephew as to the Truſt Eſtate, and then a Remainder to the Charities.

But other Lords differed, being of Opinion that Equity, as to Limitations of Eſtates or Truſts of Eſtates, ought *Sequi legem*, and that were it otherwiſe, it would be highly inconvenient, and occaſion the greateſt Uncertainty, and moſt precarious Determinations of Property; particularly the Lord *Harcourt* cited the following Expreſſion of Mr. Juſtice *Twiſden*, who, when a Matter was preſſed in Behalf of a Charity that he thought to

be

be againſt Law, replied, *I like Charity well, but will not ſteal Leather to make poor Men Shoes.*

However, ſome of the Law-Lords differing in Opinion, the *Biſhops* made a Majority for reverſing the Order of the Court of Exchequer as to the whole, which was thought not to be very miſchievous, as the Order of that Court was but to allow the Plea, and conſequently the Reverſal thereof did only put the Reſpondents to anſwer over, without determining the Right any ways againſt them *.

Caſe 220.
Lord Macclesfield.

Comber's Caſe.

An Executor bringing a *Sci. Fa.* to revive a Decree, muſt ſhew he has proved the Will; and there being *Bona Notabilia* in divers Dioceſes, if he ſhews Proof of the Will in the Spiritual Court of one of the Ordinaries, this is not good; but in ſuch Caſe the Proof muſt be in the Court of the Archbiſhop.

THE Plaintiff brought a *Sci. Fa.* to revive an old Decree obtained againſt the Defendant by the Plaintiff's Teſtator about 23 Years ſince.

---

* In Conſequence of this Order made by the Houſe of Lords the Defendants anſwered, and on the 29th of *January* 1732, the Cauſe by the Name of the *Attorney General* verſus *Young & al'* (*Payman* being then dead) came on in the Exchequer, where the Barons decreed, that the Recovery ſuffered by the Teſtator's Nephew *Thomas Sutton* of the Truſt Eſtate was void, the ſame being contrary to the Truſt created by the Will of *John Sutton*, and for that there had not been any Conveyance of the ſaid Premiſſes to Truſtees purſuant to the Directions in the ſaid *John Sutton*'s Will, and that the Defendants ſhould convey to the Truſtees for the Charity, and awarded a perpetual Injunction to quiet them in the Poſſeſſion.

With reſpect to the *Chequer-Inn*, the Court retained the Information, with Liberty to either of the Parties to aſcertain their Title by Trial at Law; upon which the *Suttons* (who claimed under the Recovery) brought their Ejectment in the Court of Exchequer, which was tried in *Hillary* Vacation 1735, and the Jury found a ſpecial Verdict, *viz.* the ſaid *John Sutton*'s Will, and all Facts neceſſary to bring the Matter of Law before the Court; and in *Eaſter* Term 1737, the ſpecial Verdict was argued; in the Term following the Court gave Judgment for the Leſſors of the Plaintiff, being of Opinion that *Thomas Sutton* the Nephew took an Eſtate-Tail in the *Chequer-Inn*, and on the 22d of *June* 1737, the Court ordered the Tenants to attorn, *&c.* to the *Suttons*.

The Defendant pleaded in Bar to the *Sci. Fa.* that the Plaintiff's Teſtator after he had recovered this Decree lived 15 Years in the ſame Town with the Defendant, and never asked him for the Money; but on the contrary told him that he ſhould never be troubled for it, and that he acquitted him thereof, (without ſuggeſting any Deed or Writing for that Purpoſe.) Alſo the Defendant farther pleaded, that the Plaintiff in the original Cauſe (who appeared by the *Sci. Fa.* to be ſince dead) died poſſeſſed of *Bona Notabilia* in two Dioceſes within the Province of *Canterbury,* viz. in thoſe of *Chicheſter* and *London*; and that the Executor having proved this Will only in the Archdeaconry of *Surry,* ſuch Probate was void, and that therefore he ought not to be admitted to ſue.

It was argued for the Plea, that though an Executor might releaſe before Probate, yet he could not ſue; and that the (*a*) Courts of Law or Equity took no Judicial Notice of any Executor until he had proved the Will, for which Reaſon, if an Executor ſhould die before Probate, leaving an Executor, this Executor would not be ſo to the firſt Teſtator, but an Adminiſtration muſt be granted *de Bonis non, &c.* Whereas if the firſt Executor had proved the Will, then his Executor would have repreſented the firſt Teſtator; and that if the Will was not duly proved now, in all Likelihood it never would; for this being a *Sci. Fa.* to have an Execution of a Decree, here was to be no Bill; but after reviving the Suit the common Proceſs would iſſue for the Execution of the Decree.

(*a*) *Vide ante* the Caſe of *Humphreys* verſus *Ingledon,* 753.

Lord Chancellor: If this had been an Adminiſtration granted by the Archdeacon or Ordinary where there were *Bona Notabilia* in divers Dioceſes, the Adminiſtration

tion had been merely void; for the Adminiſtrator receives his Reght entirely from the Adminiſtration, but the Right of the Executor is derived from the Will, and not from the Probate, as appears from an Executor's having Power to releaſe or aſſign any Part of the Perſonal Eſtate before Probate; and a Defendant at Law cannot plead to any Action brought by an Executor, that the Plaintiff has not proved the Will; though it is true he may demur, if the Plaintiff does not in his Declaration ſhew the Probate.

However, let not the Plaintiff in this *Sci. Fa.* proceed any farther in his Suit without ſhewing the Defendant a ſufficient Probate of the Will, and without the farther Leave of the Court, in Reſpect of the Staleneſs of the Demand.

Caſe 221.

At the Rolls.

Middleton verſus *Lord Onſlow* & *al.*

If on the Conſent of the Wife and her Truſtees, and in order to a Compoſition with the Huſband's Creditors, the Court orders Part of the Truſt Money to be paid to the Creditors thus conſenting to diſcharge him of the Debts, any private Notes, &c. taken by any of the Creditors for Part of their Debts, beſides their Share with the reſt of the Creditors, will be ſet aſide.

ONE Mr. *Hockenel* married one of the Daughters and Coheirs of Mr. *Middleton* without the Conſent or Privity of her Relations, and being much in Debt, abſconded in privileged Places, for fear of his Creditors, but being a young Gentleman in Hopes of ſome Employment, and his Wife entitled to a Portion of about 5 or 6000 *l.* in the Hands of her Truſtees, ſhe with her Truſtees petitioned the *Maſter of the Rolls*, that they might make Propoſals to Mr. *Hockenel*'s Creditors touching the Compoſition of his Debts, and that thereupon the Truſtees might be at Liberty to apply any Sum not exceeding 500 *l.* for that Purpoſe; and Mrs. *Hockenel* the Wife being in Court, conſented that the Truſtees ſhould diſpoſe of 500 *l.* of her Portion for the Purpoſes aforeſaid.

Several of the Creditors (to the Number of about Fifty) ſigned the Deed of Compoſition to take 7 *s.* 6 *d.* in the Pound; but about Seven of the Creditors (being the Remainder of them) delayed the Execution of the Deed of Compoſition until the laſt Day, and then executed it; but at the ſame Time took Notes and Bonds from Mr. *Hockenel*, to pay the reſt of the Money at a future Day, ſome of which were poſtdated, and bore Date after the Deed of Compoſition, ſome made to other Perſons in Truſt, and others made payable to the Creditors or Order by way of Promiſſory Notes; and in the Deed of Compoſition, the Petition and the Order of Court were recited.

And now Mrs. *Hockenel* and her Truſtees petitioned the *Maſter of the Rolls*, that the Creditors might deliver up and diſcharge all theſe Securities.

Cur': I ſhould not, nor indeed could I compel any honeſt Creditor to compound his Debt; but when they have compounded and agreed to accept of 7 *s.* 6 *d. per* Pound, and by Suggeſtions that Mr. *Hockenel* was to have his Liberty, have induced the Court to give way, and the Wife to conſent that Part of her Portion, which was not before liable to theſe Debts, ſhould be applied to this Purpoſe, and have prevailed upon the Truſtees to give away Part of the Portion to the Creditors, and afterwards, on the laſt Day mentioned in the Deed of Compoſition (which provided that the whole Deed ſhould be void unleſs ſealed by all the Creditors by ſuch a particular Time) have come in to take Advantage of the Neceſſities of the Husband, and to gain theſe underhand ſecurities; as they thereby defeat the Intent of the Order of Court authorizing the Truſtees

to

to compound; as they diſappoint the Wife, who, in Hopes of her Husband's Liberty, conſented that Part of her Portion ſhould be applied to the Diſcharge of his Debts, and as they fruſtrate the Intention of the Truſtees, who in Confidence of the Husband's having his Liberty, have paid away Part of the Portion towards the Debts; this underhand Dealing of the Creditors is a Fraud on the Wife, on the Truſtees, and on the Court; for which Reaſon let all ſuch Securities be ſet aſide and delivered up by the Creditors to the Husband Mr. *Hockenel*.

Caſe 222.
Lord Macclesfield.

Hawkins verſus *Holmes*.

One alters a Draught with his own Hand for the purchaſing an Eſtate; this not a Signing to take it out of the Statute of Frauds, tho' the Seller afterwards executed the Conveyance and cauſed it to be regiſtred.

THE Plaintiff agreed with the Defendant to ſell him a Houſe for 640 *l.* and by Conſent of both Parties an Attorney was employed to make a Draught of the Conveyance; which the Attorney accordingly prepared and ſent to the Defendant, who made ſeveral Alterations therein, and delivered it back to the Attorney to be ingroſſed; whereupon a Time was appointed for the Plaintiff and Defendant to meet at a Tavern to execute the Writings, and for the Latter to pay the Money.

The Plaintiff and his Attorney came to the Tavern, where the Plaintiff executed the Writings, and having got the Conveyance regiſtred (the Houſe being in *Middleſex*) brought this Bill againſt the Defendant to compel him to pay the Purchaſe Money.

As to ſuch Part of the Bill, as ſought to compel the Defendant to accept the Purchaſe and pay the Money, the Defendant pleaded the Statute of Frauds and Perjuries, and ſaid, "That neither he, nor any by him

" lawfully authorized, ſigned any Writing Agree-
" ment, Memorandum or Note in Relation to this
" Purchaſe, or whereby the Defendant any ways agreed
" thereto."

For the Plaintiff it was objected, that the Defendant's Altering the Draught with his own Hand, was as a Signing, it not being material to what Part of the Draught he had ſet his Hand, and in this Caſe the Contract muſt be looked upon as carried into Execution, the Plaintiff having executed the Deeds of Conveyance, and regiſtred them in the proper Office.

To which it was anſwered, that the Statute requires that the Party, or ſome Perſon by him lawfully authorized, ſhould ſign the Writing; and though the Defendant had altered the Draught with his own Hand, yet this could not be called a Signing; that the Statute requires Signing as a material Circumſtance, which is not to be diſpenſed with in Equity, any more than at Law; that if the Defendant had himſelf wrote over the whole Deed with his own Hand, without ſigning it, this had not been ſufficient, for the Statute has made Signing abſolutely Neceſſary for the Completion of the Contract; for which Purpoſe I cited the Caſe of * *Ithel* verſus *Potter*.

Lord Chancellor: Unleſs in ſome particular Caſes where there has been an Execution of the Contract by entring upon and improving the Premiſſes, the Party's Signing the Agreement is abſolutely neceſſary for the Compleating of it; and to put a different Conſtruction upon the Act, would be to repeal it; as to what has been inſiſted upon in Relation to the Plaintiff the Vendor's executing and regiſtring the Deeds, this indeed looks artful on the

---

* Determined at the Rolls, *Trin.* 1719. on the very ſame Point.

Plaintiff's Side, but is all of it immaterial, with Reſpect to the Defendant, to whom the other could not convey or veſt an Eſtate in him againſt his Will: It is true, the Plaintiff's having regiſtred the Conveyance may put a Difficulty on him how to get back the Eſtate; but it being his own doing, and with a Deſign to faſten the Eſtate on the Defendant, he muſt thank himſelf for it.

His Lordſhip moreover laid a Streſs on what the Defendant mentioned in the anſwering Part, wherein it was ſworn that it had been agreed between the Plaintiff and the Defendant, that the latter might be off at any Time, on paying the Charge of preparing the Writing, which the Defendant ſaid he was willing to do.

DE
Term. S. Hillarii,
1721.

Herbert & al' verſus *The Dean and Chapter of Weſtminſter and Dr. Broderick, & econtra.*

Caſe 223.

UPON the Plague which happened in the Year 1625, the Church-yard of St. *Margaret*'s *Weſtminſter* not being large enough to bury the dead Pariſhioners, the Inhabitants of that Part of the Pariſh, which now reſorts to the new Chapel built there, petitioned the Dean and Chapter of *Weſtminſter* (who were Lords of the Manor) to grant them a waſte Piece of Ground to bury their Dead, which accordingly the Dean and Chapter did under their Seals, and it was ſolemnly conſecrated; afterwards theſe Inhabitants were at the Charge of building a Chapel there, having firſt obtained a Royal Licence for that Purpoſe. The Veſtry-men and Chapel-Wardens had ever ſince the Year 1653 elected the Miniſters who were to preach there; but now the Dean and Chapter of *Weſtminſter* claimed a Right to name the Miniſter who ſhould preach and do Divine Service in this Chapel.

On a Bill brought to ſettle the Right of nominating the Parſon of this Chapel; and on a Motion by the

Defendants that the Plaintiffs might produce the Veſtry-Books before a Maſter, for the Defendants if they pleaſed to take Copies; it was objected, that the Plaintiffs ought not to be ordered to produce their Evidence; for that this Caſe was not like that of a Lord of a Manor producing his Court-Rolls to the Tenant, becauſe the Lord, as to the Court-Rolls, is a Truſtee for the Tenant; whereas one, not a Tenant, cannot oblige the Lord to produce his Court-Rolls; and here the Dean and Chapter are Strangers.

Lord Chancellor: When the Dean and Chapter gave this Ground, they did not reſerve any Power to nominate the Preacher; and the Inhabitants of the Chapelry were at the Expence of building the Chapel. Now the Building and (*a*) Endowing of the Church, was what at Common Law originally entitled the Patron to the Patronage; here the Inhabitants built the Chapel, and (as appears) by the Pew-Money have endowed it. It is not reaſonable to ſay that the Dean and Chapter, as Parſon appropriate, have a Right to ſupply every Chapel built within the Pariſh with a Preacher; it would be an Expence and Hardſhip upon them to be obliged ſo to do; neither ought it to be at their Election to ſupply it: For ſuppoſe I build a Chapel in my Houſe for myſelf, the Parſon is not bound to provide for it; or ſuppoſe I build a Chapel in my Houſe for myſelf or my next Neighbour, can the Parſon Name one to preach there? I think not; and it will make no Alteration, if the Chapel which I build in my own Ground, be intended for the Uſe of twenty Neighbours beſides my own Family.

Building and endowing of a Church, did originally entitle the Patron to the Patronage. Impropriator of a Pariſh has no Right to nominate a Preacher to every Chapel within the Pariſh; it might be a Hardſhip if he ſhould be bound ſo to do; neither ought it to be at his Election. One may build a private Chapel for himſelf and Family, or for himſelf and Neighbours, or for himſelf and twenty Neighbours, and this will not give the Parſon a Right to nominate a Preacher there.

(*a*) 1 Inſt. 17. *b.* 119. *b.*

As to the Motion, that the Plaintiffs ſhould produce the Veſtry-Books before a Maſter, ſince they in their Anſwer to the Croſs Bill refer thereto, and by that Means make them Part of their Anſwer, referring to them (as it is ſaid) for Fear of a Miſtake; for that Reaſon the Court ought to let the Defendants ſee them; otherwiſe there would be no relying upon the Anſwer of thoſe who are thus guarding themſelves by References for fear of a Miſtake, and to avoid Exceptions to their Anſwer: Wherefore, for that the Plaintiffs, who are bound to hear their Cauſe in a ſhort Time, have the Favour and Aid of the Court by an Injunction, and to the Intent that the Cauſe may come more fully before the Court at the Hearing, let them bring the Veſtry-Books before the Maſter, and the Defendants who are Plaintiffs in the Croſs Cauſe, if they pleaſe, take Copies.

But (*a*) afterwards on the Hearing, the Court decreed that the Right of Nomination of the Miniſter did belong to the Dean and Chapter.

(*a*) 1 March 1721.

Coleman verſus *Winch.*

Caſe 224.
Lord Macclesfield.

A. Seiſed in Fee of Lands makes a Mortgage to *B.* for 100*l.* and afterwards borrows 100*l.* more of *B.* upon Bond, and dies; the Heir at Law conveys the Inheritance and Equity of Redemption of the Premiſſes to Truſtees, in Truſt for Payment of all the Bond and Simple-Contract Debts of his Father equally; after which the Truſtees bring their Bill to redeem *B.* who inſiſts on being paid his Debt by Bond, as well as that by Mortgage; and for the Mortgagee it was objected,

One ſeiſed in Fee mortgages to *A.* and afterwards binds himſelf and his Heirs by Bond to *A.* and dies; if the Heir comes to redeem this Mortgage, he muſt pay the Bond-Debt as well as the Mortgage; but if the Heir aſſigns the Equity of Redemption to *J. S.* who brings his Bill to redeem, he ſhall pay the Mortgage only, and not the Bond.

Firſt, That as he had the Eſtate at Law abſolutely, and the Truſtees could not come at it without the Interpoſition of Equity, it ſeemed not agreeable to Reaſon,

ſon, that he ſhould be hindered by this Court from receiving what was due to him by Bond as well as by Mortgage, the former being as juſt a Debt, and as much due in Conſcience as the latter.

Secondly, That if the Heir had brought a Bill to redeem the Mortgage, it was plain he muſt have paid as well the Bond-Debt as that by Mortgage; and if the Heir muſt have paid it, why ſhould any one claiming under him, be in a better Condition than he himſelf?

Lord Chancellor: The Bond of the Anceſtor, wherein the Heir is bound, becomes upon the Anceſtor's Death the Heir's own Debt, for which he is ſuable in the *Debet* and *Detinet*; and therefore if he comes to redeem the Mortgage made by his Anceſtor, he muſt pay the Debt by Bond, as well as that by Mortgage; but though this be the Debt of the Heir, it cannot be ſaid to be due from the Heir's Aſſignee, the Bond being no Lien upon the Land; which appears moſt plainly, in that it was no Lien on the Land, even againſt the * Mortgagor himſelf, who happened to be indebted to the ſame Perſon by Mortgage and by Bond. Suppoſe one be indebted to *A.* by Mortgage of a Term for Years, and alſo indebted to him by Bond; if on the Death of the Mortgagor, his Executor brings a Bill to redeem the Mortgage

So if one poſſeſſed of a Term for Years, mortgages it to *A.* and afterwards becomes indebted by Simple Contract to *A.* and dies, the Executors ſhall not redeem without paying as well the Note as the Mortgage; *ſecus* if any Creditor of the Teſtator brings his Bill to redeem.

---

* *Quære tamen*; for in the Caſe of *Baxter* verſus *Manning*, 1 Vern. 244. It was decreed by Lord Keeper *North*, that where the Mortgagee lent more Money to the Mortgagor on Bond, the Mortgagor ſhould not redeem without paying the Bond-Debt as well as the Mortgage; and yet in the Caſe of *Challis* verſus *Casborn*, Precedents in Chancery 407. it was laid down by Counſel for a Rule, and agreed to by Lord *Cowper*, that the Mortgagor himſelf is in ſuch Caſe to be let into a Redemption upon Payment of the Mortgage Money only; tho' poſſibly there may be ſome Difference, as to the Rule of the Court, between a Mortgagor's coming to redeem and a Mortgagee's bringing his Bill to foreclоſe.

Mortgage, he muſt pay both; but if the Executor aſſigns over the Equity of Redemption of the mortgaged Term, and the Aſſignee of the Executor brings a Bill to redeem, *he* ſhall only pay the Mortgage Money. So if the Teſtator being poſſeſſed of a Term mortgages it to *A.* and becomes alſo indebted to *A.* by Simple Contract and dies, his Executor bringing a Bill to redeem, ſhall pay both the Mortgage and the Debt by Simple Contract, becauſe the very Equity of Redemption is Aſſets to pay Simple-Contract Debts; but if any Creditor of the Teſtator brings a Bill to redeem this Mortgage, he ſhall pay only the Mortgage.

Lord Chancellor farther ſaid, that the Law of *England*, in Suits againſt Heirs, imitated the Civil Law; where an Heir ſued by a Bond-Creditor is ſued as for his own Debt in the *Debet* and *Detinet*, and is *primâ facie* ſuppoſed to have Aſſets, but that the Heir might diſcharge himſelf by ſaying, that at the Time of the Writ brought he had no Aſſets, or if he has Aſſets deſcended, may ſhew thoſe Aſſets, of which the Plaintiff may, if he pleaſes, take Judgment; and that in Caſe the Heir had aliened before Action brought, though at Law there was no Remedy againſt him, yet in Equity he was reſponſible for the Value of the Land aliened; but now the Heir is made liable at Law (a) for the Value of the Aſſets he has aliened.

(a) By 3 & 4 *W.* & *M.* *cap.* 14.

Savile verſus *Blacket*.

Caſe 225.
Lord Macclesfield.

A Settlement of Lands was made to the Uſe of *A.* for 99 Years, if he ſhould ſo long live, Remainder to Truſtees during the Life of *A.* &c. Remainder over, with a Power to *A.* to charge the Lands with di-

Tenant for 99 Years, if he ſo long live, with Power of charging the Premiſſes with Sums of Money, joins in ſuffering a Recovery, and declares the Uſes thereof; this extinguiſhes the Power of charging the Eſtate.

vers Sums of Money. *A.* the Truſtees and the Remainder-man in Tail join in ſuffering a Recovery, and declaring new Uſes thereof, *viz.* to the Uſe of *A.* for Life, with Remainder over.

Lord Chancellor: This joining of *A.* in making the new Settlement without reſerving a Power to charge the Premiſſes with the ſaid Money, has deſtroyed that Power which *A.* had of charging; for the contrary Conſtruction would enable him to defeat his own Grant.

Diverſity between Powers annexed to an Eſtate, and ſuch as are collateral thereto; the firſt paſs with the Eſtate, the ſecond not.

There are two Sorts of Powers, one annexed to the Eſtate, as a Power to make Leaſes, *&c.* which is deſtroyed by parting with the Eſtate; another which may be termed collateral to the Eſtate, as this Power of charging it with Money; and this laſt *A.* would have had, tho' he ſhould have ſurvived the Term of 99 Years; for ſtill he might have charged the Premiſſes therewith; ſo might he have done, though he had aſſigned over the Term; but having joined in the new Settlement, he muſt not now derogate from his own Act, or undo what he has done before.

One deviſes a Legacy out of a Fund, which fails, whether, and in what Caſes, the Legacy ſhall be paid out of the Perſonal Eſtate.

Then another Queſtion aroſe upon the Will of *A.* whereby he had bequeathed 1000 *l.* to *J. S.* out of theſe Lands; and it was inſiſted, that though this might not be good as a Charge, it ſhould nevertheleſs take Effect as a Legacy, which was not hurt by making an additional Security for it; and therefore if one ſhould grant an Annuity out of the Manor of *Dale*, to which he had no Title, though this could not operate as a Charge upon the Manor, yet would it be good as a Grant of an Annuity to charge the Perſon; for that the main Intent of the Teſtator being to give this Legacy to *J. S.* the Legatee ſhould have it one way or another, either out of the Land or perſonal Eſtate.

Lord Chancellor: Here is a particular Proviſion for this Legacy of 1000 *l.* Now it is poſſible for a Legacy to be charged in ſuch a Manner upon a certain Fund, as that upon its Failing, the Legacy ſhall be loſt. It is material, that this Bequeſt is grounded upon a Power, and may be thought no more than the Execution of that Power, which, if void, muſt of courſe be a void Bequeſt alſo. It is likewiſe obſervable, that the Will gives the Reſidue to the Teſtator's eldeſt Son: So that to make this Legacy good, the Child who is the Legatee, and otherwiſe provided for, muſt take it away from another Child, and what makes it ſtill harder in the principal Caſe is, that the Legacy would by this Means be taken away from an Heir, in order to be given to a younger Child. A Charge upon Land ſeems not to be ſo ſtrong as a Gift of a Legacy.

But at length it weighed with the Court, that the Value of this Land was ſo conſiderable as to amount to 1000 *l. per Ann.* and the Deſign appeared to be, to leave the younger Child the two ſeveral Sums of 1000 *l.* one charged by expreſs Words upon the perſonal Eſtate, and the other upon the Land; *his Lordſhip* ſaying, That if a Legacy was given to *J. S.* to be paid out of ſuch a particular Debt, and there ſhould not appear to be any ſuch Debt, or the Fund fail, ſtill the Legacy ought to be paid, and the Failing of the (*a*) *Modus* appointed for Payment ſhould not defeat the Legacy itſelf.

(*a*) Vide Swinb. 127.

Trott

Caſe 226. *Trott* verſus *Dawſon*, & *econtra*.

A. is a Truſtee for *B.* as to an Eſtate. *A.* lays out Money in relation to the Truſt Eſtate; after which *B.* aſſigns the Truſt to *C.* who brings a Bill for a Conveyance of the Eſtate; *C.* ſhall have no Conveyance until *A.* is paid all his Money by him expended or due in relation to the Premiſſes.

THE Plaintiff was a Truſtee for one *Archdale*, as to an Eighth of the Proprietorſhip of the Province of *Carolina*, and was put to great Trouble and Charge in relation to the Affairs of the Province. This Buſineſs, Charge and Trouble was all undergone during ſuch Time as *Archdale* was the *Ceſtui que Truſt*, and afterwards *Archdale* aſſigned his Intereſt to the Defendant, who, being ſued by the Plaintiff *Trott* for the Money expended by him in relation to the Premiſſes, brought his Croſs Bill againſt the Plaintiff the Truſtee, in order to compel him to convey over the Truſt Eſtate to the Defendant, who, as was inſiſted, ought not to allow for any of this Charge and Trouble, which was all upon the Credit of *Archdale*.

Lord Chancellor: *Dawſon* the Aſſignee of *Archdale* cannot be in a better Caſe than *Archdale*, under whom he claims; wherefore as *Archdale* would not have had the Aſſiſtance of a Court of Equity, without paying for the Charge and Trouble which *Trott* had been at in relation to this Truſt: So by a Parity of Reaſon the Defendant *Dawſon*, as claiming under *Archdale*, muſt do the ſame Thing, which it was incumbent upon *Archdale* to have done.

Benger verſus *Drew*.

Caſe 227.
Lord Macclesfield.

Where in a Grant of a Copyhold for three Lives, *viz.* to the Huſband and Wife and a third Perſon, the Fine was mentioned to be paid by the Husband and Wife: This, there being no full Evidence to the contrary, made the third Perſon only a Truſtee for the Husband and Wife, and the Survivor of them.

SOME Copyhold Lands held of a Weſt Country Manor were granted by Copy to the Huſband and Wife and *J. S.* for their ſeveral Lives *ſucceſſivè*, and by the Copy it appeared that the Fine paid to the Lord of the Manor was the Money of the Huſband and Wife.

Lord Chancellor: This third Perſon (*J. S.*) named in the Grant is in Equity to be intended but as a Truſtee for the Huſband and Wife, and the Survivor of them, by whom the Purchaſe Money was advanced, and it being mentioned in the Copy that the Fine was paid by the Huſband and Wife, is ſtrong Evidence of the Fact's being ſo; which though the Court will not look upon as concluſive, yet any Evidence given to contradict it, ought, in order to prevail, to be very clear and full.

Wood verſus *Story* and *Bell*.

Caſe 228.
Lord Macclesfield.

The Court allowed a Quaker to put in his Anſwer without Oath or Affirmation where the Bill appeared frivolous.

THE Defendant *Story* was a Quaker, and of ſo tender a Conſcience, that he could not prevail with himſelf either to ſwear or affirm. The Plaintiff brought a groundleſs Bill againſt him to be relieved touching the Sum of 44 *l.* 2 *s.* for two Shares in the *Penſilvanian* Company, of which two Shares the Plaintiff was Purchaſer; but it appeared that the other Defendant *Bell* ſold theſe Shares to the Plaintiff, and received of him the Purchaſe Money.

The Defendant *Story* was committed for not anſwering; and now on his Petition to be admitted to anſwer without Oath or Affirmation:

Lord Chancellor: Nothing can more pervert Juſtice than to make a Court of Juſtice and the Proceſs thereof a Means of Oppreſſion; and whenever that appears to be the Caſe, I will relieve the Party oppreſſed.

Let the Defendant be diſcharged out of Cuſtody, and his Anſwer taken without Oath or Affirmation.

Note; It was ſaid that the like Order had been made by the Lord *Harcourt* in Dr. *Heathcote*'s Caſe.

Caſe 229.

Lord Macclesfield.

An Aſſignee or Indorſee of a Bankrupt's Notes at an under-Value is a Creditor for the full Sums of the Notes, and may ſue out a Commiſſion as a Creditor for ſuch full Sums. *Secus*, of an Aſſignee of a Bond, or where the Indorſement of the Note is ſubſequent to the Bankruptcy.

Ex Parte *Lee*.

J. S. petitioned to take out a Commiſſion of Bankruptcy againſt *Lee*, and his Debt (amounting to 100 *l.*) appeared to conſiſt of Notes made payable by the Bankrupt to other Perſons who had indorſed them to the Petitioner, and to have been bought in by him at 10 *s.* in the Pound; upon which it was objected that ſuch Creditor who came by his Debt in this Manner, was not entitled to ſue out a Commiſſion.

Lord Chancellor: Though the Petitioner for this Commiſſion has thus gained the Notes given by the Bankrupt, yet he is plainly a Creditor, juſt as if the Perſons, to whom the Bankrupt before his Bankruptcy gave theſe Notes, had paid an Under-rate for them; nay, though they had been given without any Conſideration, yet are they now become his Debts, and the legal Right thereto veſted in the Indorſee. *Secus*, in caſe of an Aſſignment of a Bond, foraſmuch as ſuch Aſſignee, not being the legal Creditor, could not have taken out a Commiſſion. Alſo, had the Indorſment in the principal Caſe been made after the Bankruptcy, it might be a Queſtion whether ſuch Indorſee would be intitled to a Commiſſion; he not being a Creditor for 100 *l.* or capable of taking out a Commiſſion at the Time of the Party's becoming a Bankrupt.

Acherley verſus *Wheeler* & *Vernon*.

Caſe 230.
Lord Macclesfield.

A. amongſt other Legacies leaves 1000 *l.* to his Niece *B.* at 18 or Marriage, and gives the Reſidue of his Perſonal Eſtate to be laid out in Land, and ſettled in ſtrict Settlement on *C.* for 99 Years, Remainder to his firſt Son, &c. in Tail, afterwards *A.* by Codicil deviſes, that the 1000 *l.* given by his Will to his ſaid Niece ſhould be made up 6000 *l.* payably at 21 or Marriage: The Niece was 18 at the Time of the Teſtator's making his Codicil and under 21. Decreed ſhe ſhould have the Intereſt of the 6000 *l.* from the Death of the Teſtator, and that *C.* was only intitled to the *Reſiduum* excluſive of the 6000 *l.*

THE Bill was to recover the Intereſt of a Legacy of 6000 *l.* given to the Plaintiff by the Will of her Uncle Mr. *Vernon.*

Mr. *Vernon*, the eminent Chancery Counſel, by Will dated the 17th of *January* 1711, bequeathed to his Siſter's Daughter the Plaintiff *Lætitia Acherley* 1000 *l.* at her Age of 18, or Marriage, which ſhould firſt happen, and after ſome Legacies gave the Reſidue of his Perſonal, and all his Real Eſtate, to the Defendant *Wheeler* and others, in Truſt (the Perſonal Eſtate being firſt inveſted in Land) to ſettle the whole on the Defendant *Bowater Vernon* for 99 Years, if he ſhould ſo long live, Remainder to Truſtees during his Life, to preſerve contingent Remainders, Remainder to his firſt and other Sons ſucceſſively in Tail Male, Remainder over in like manner to the Brother of the Defendant *Bowater Vernon*.

Afterwards, by a Codicil dated the 2d of *February* 1720, the Teſtator appointed that the Portion of 1000 *l.* given by his Will to his Niece the Plaintiff *Lætitia*, ſhould be made up in the Whole the Sum of 6000 *l.* and payable to her at her Age of 21 or Marriage, which ſhould firſt happen, to be in lieu and Satisfaction of all ſhe might claim out of his Real or Perſonal Eſtate, and upon Condition that ſhe ſhould releaſe all Right and Title thereunto unto the Executors and Truſtees in the Will named.

The Teſtator died without Iſſue, leaving his Siſter *Elizabeth Acherley* the Plaintiff's Mother his Heir at Law, the Defendant *Wheeler* and others Executors in Truſt, and the Plaintiff *Lætitia* about 18 Years of Age, who now brought this Bill, praying that ſhe might have Intereſt paid her for the 6000 *l.* until her Age of 21 or Marriage, at which Time ſhe was entitled to the Principal.

Object. Intereſt is in its Nature demandable for Non-payment of a Thing when due; whereas this Legacy of 6000 *l.* is not due until the Plaintiff's Age of 21 or Marriage, conſequently no Intereſt can be claimed until ſuch Time as ſhe would be entitled to the Principal. Farther, by the Terms of the Codicil ſhe is to releaſe all Right or Title to the Teſtator's Real or Perſonal Eſtate, which it does not appear ſhe has done, nor has ſhe offered ſo to do by her Bill; beſides, by the Deviſe of the Reſidue, the Intereſt of the 6000 *l.* does paſs, which cannot be *Debitum in præſenti, ſolvendum in futuro*, as it comes in lieu of the original Legacy of 1000 *l.* given to the Plaintiff by the Will at her Age of 18 or Marriage, which Sum by the Codicil is ordered to be made up 6000 *l.* and notwithſtanding there are the Words added to it, *payable* at 21 *or Marriage*, yet the Legacy by the Codicil ought to follow the Nature of the original one given by the Will, though increaſed and made a greater Sum; for which Reaſon till the Principal becomes due, the Intereſt thereof belongs to the Reſiduary Legatee.

On the other Side it was argued, firſt that the Legacy of 6000 *l.* was by the Will and Codicil ſevered from the Heap and Bulk of this great Eſtate; for after the ſeveral Legacies given by the Will, the reſt and Reſidue of the Teſtator's Real and Perſonal Eſtate is deviſed to Truſtees in Truſt to be ſettled on the Teſtator's Couſin *Bowater* for 99 Years, Remainder to Truſtees during his Life, *&c.* Remainder to his firſt, *&c.* Son in Tail Male ſucceſſively, *&c.* ſo that nothing was intended to be laid out in Land, but the reſt and Reſidue after all the Legacies paid, conſequently this 6000 *l.* given by Mr. *Vernon* to his Niece *Acherly*, was never intended to be inveſted in a Purchaſe, which was ſaid to be acknowledged by Mr. *Bowater Vernon*'s own Anſwer.

2*dly*, As to the Condition that the Plaintiff ſhould releaſe all her Right to the Real and Perſonal Eſtate of the Teſtator, it was plain ſhe could have no Right during the Life of her Mother, who was the Siſter and Heir of the Teſtator; alſo ſhe might marry while an Infant, by which Means her Legacy might become due, and ſhe not capable of releaſing, or might intermarry with an Infant, and ſo neither ſhe nor her Husband be capable of releaſing, and yet the Legacy due; wherefore ſuppoſing it to be a Condition, it could be no more than a Condition ſubſequent, *Quod Cur. conceſſit.*

3*dly*, It was inſiſted that there was a Clauſe in the Codicil, which made this Caſe ſtill ſtronger for the Plaintiff, *viz.* that the Teſtator after all his other Debts and Legacies, "willed that out of the Surplus of his Per-
"ſonal Eſtate, the Sum of 1000 *l.* ſhould be put apart
"for the Benefit of the Poor of *Hanbury* and *Shrawley*,
"to be kept as a perpetual Stock for buying Gowns for

" poor old Men and Women, and Coals and other Fuel " in the Winter." Now this ſhewed that immediately on the Teſtator's Death it was intended Monies ſufficient ſhould be ſet apart to pay all the Legacies; for till then it could not be known what the Surplus was; and even out of ſuch Surplus 1000 *l.* was to be appropriated to this Charity, and only the Reſidue to be inveſted in Land, and ſettled *ut ſupra.*

That ſuppoſing the Fund out of which this 6000 *l.* was to be paid had conſiſted of Mortgages carrying Intereſt, ſince Mr. *Bowater Vernon* could not have the Intereſt thereof, (as plainly he could not, being entitled to the Intereſt of nothing but what was to be laid out in Land,) it followed of Neceſſity that the Legatee the Niece ought to have it.

And the Caſe of *Bourne* verſus *Tynte*, reported 2 *Vent.* 346, was on this Occaſion cited as taken from the Regiſter's Book, being inſiſted on to be much ſtronger than the principal Caſe; it was thus:

Roger Bourne having Lands of 500 *l. per Ann.* and a Perſonal Eſtate of 8000 *l.* owing to him upon Mortgages, *&c.* and having no Child then living, by his Will deviſed to Sir *Haſwell Tynte* and others (whom he made Executors) and their Heirs, all his Lands, and Perſonal Eſtate ſecured by Mortgages, *&c.* in Truſt to lay out all his Perſonal Eſtate, which ſhould remain after his Debts and Legacies paid, in the Purchaſe of Lands to be ſettled on the Teſtator's Sons (if any) in Tail, Remainder to his Brother *Gilbert Bourne* for Life, with Remainder over to the ſaid *Gilbert*'s Sons, *&c.* he deviſed, that in caſe the Child his Wife was then big withal ſhould be a Daughter, ſhe to have 1000 *l.* to be paid at 21 or Marriage, and if ſhe ſhould marry with Conſent, *&c.* then her Portion to be augmented to 3000 *l.* which Sum ſhould be ſecured and kept for that Purpoſe out of his Mortgage Money, and other

Securities, to be paid her at her Age of 21 or Marriage; his Wife to have the Education of his Daughter, and out of the Intereſt of the 3000 *l.* to receive 80 *l. per Annum* from the Truſtees for that Purpoſe; that in caſe the Daughter ſhould die before Marriage or 21, then her Portion and all Monies ſo deviſed to her, to be employed for the Benefit of ſuch Perſons as were to enjoy his Lands according to his Will, directing that the reſt of his Perſonal Eſtate not given or diſpoſed of by his Will, ſhould be *all of it* laid out in Land and ſettled as aforeſaid. After the Teſtator's Death a Daughter was born, and the Executors for about eight Years paid the Intereſt of the 3000 *l.* above the 80 *l. viz.* 100 *l. per Annum* to *Gilbert* the Brother; but then being better adviſed ſtopt Payment; upon which *Gilbert* the Brother brought his Bill to recover the Intereſt above the 80 *l. per Annum*, inſiſting that the reſt of the Perſonal Eſtate being *all of it* to be laid out in Land, this did by expreſs Words, or by a neceſſary Implication, include all the Intereſt of the 3000 *l.* above the 80 *l. per Annum*: That there was a Contingency in this Caſe importing a Condition Precedent, *viz.* That if the Daughter ſhould die before 21 or Marriage, the whole 3000 *l.* was to be laid out in Land.

But in that Caſe the Lord Chancellor (*Finch*) declared that it was never the Teſtator's Intention the 3000 *l.* ſhould be laid out in Land, or that *Gilbert* his Brother ſhould have any Benefit thereby in caſe a Daughter was born, which had happened; that *Gilbert* the Brother's Suit was both unneceſſary and unkind, in regard he had a very good Eſtate in Lands of Inheritance from the Teſtator who had no Obligation to leave the ſame to him: Wherefore his Lordſhip decreed that *Gilbert* the Brother ſhould repay what he had received, that the Truſtees ſhould pay the Intereſt of the 3000 *l.* (above the 80 *l. per Annum*) for the Benefit and Advantage of the Daughter till 21 or Marriage; and alſo pay the 3000 *l.* at the Time limited by the Will.

Now this Caſe was ſaid to be ſtronger than the principal one. 1*ſt*, In that here was an expreſs Proviſion of 80 *l. per Annum* to the Mother for the Education of the Daughter, which might by Implication be thought to exclude the Daughter from any farther Advantage of her Portion, until ſhe ſhould come to the Age of 21 or marry, at which Time the Portion was to become due.

Alſo in the Caſe cited the Legacy was not veſted; but if the Daughter ſhould die before 21 or Marriage, then it was to ſink. Whereas in the principal Caſe there was a veſted Legacy tranſmiſſible to Executors, though the Plaintiff *Lætitia* ſhould die before 21 or Marriage.

Again, the Deviſe there was to a Brother, but here to a remoter Relation, and out of a much larger Fund.

The *Lord Chancellor*, having taken Time to conſider of the Caſe, declared that the Plaintiff *Lætitia* was entitled to the Intereſt of the 6000 *l.* from the Death of the Teſtator, ſaying, It had Weight with him, that by the Will the 1000 *l.* Legacy left to the Plaintiff was given her at 18, but ſhe coming to that Age in the Teſtator's Life-time, the Codicil ordered it to be made up 6000 *l.* yet not to be paid until 21 or Marriage; ſo that though the actual Payment was ſtopt until 21 or Marriage, it was however veſted preſently, and being ſevered from the reſt of the Eſtate, which *Reſiduum* only the Defendant *Bowater Vernon* was concerned in; therefore the Intereſt of the 6000 *l.* from the Death of the Teſtator could belong to none but the Piaintiff *Lætitia*: Which was decreed accordingly*.

---

* This Caſe is miſplaced in Point of Time, not having been decreed till the *Trinity* Term following.

The End of the Firſt Volume.

A TABLE OF The Principal Matters Contained in The FIRST VOLUME.

Abatement.

ON a Plea in Abatement, for Want of proper Parties, it is in the Power of the Court to diſmiſs the Bill without Prejudice, or to give Leave to amend on the Payment of Coſts. *Page* 428

On a Bill brought by a Bankrupt againſt the Defendant his ſuppoſed Debtor for an Account, the Aſſignees under the Commiſſion were charged in a proper Manner, but the Prayer of Proceſs was only againſt the Defendant; a good Plea in Abatement that the Aſſignees were not made Parties. *Page* 593

Abeyance.

The Reaſon why an Eſtate is ſaid to be in Abeyance. 516

In caſe of a Will, where the Remainder is deviſed in Contingency, the Reverſion in Fee is not in Abeyance in the mean while, but deſcends to the Heir. *ibid.*

A TABLE *of the Principal Matters,*

Accident. See **Caſualties.**

Account.

Where an Executor has an expreſs Legacy, the Court of Chancery looks upon him but as a Truſtee, and will make him account for the Surplus, though the Spiritual Court has no ſuch Power. *Page* 7

Captain of a Ship dies leaving Money on board, intended to be improved in Trade, the Mate becomes Captain, and improves the Money, he is liable to account for the Profits, and not for the Intereſt only. 140

In an Account both Parties are Actors. 263

And may revive. 743

A. is a Goldſmith, and there is mutual Credit betwixt *A.* and *B.* and *A.* becomes a Bankrupt, only the Ballance ſhall be liable to the Bankruptcy: neither is it material whether the mutual Credit be by open Account, or mutual ſtated Debts. 325

If after a Decree to account an Executor or Adminiſtrator does not revive within ſix Years, this is not within the Statute of Limitations. 742

Action or Suit.

Debt againſt the Sheriff for an Eſcape of one in Execution on an Outlawry after Judgment, may be brought either in the *Tam quam* or at the Suit of the Party only. *Page* 687

Ademption. Vide Title **Legacy.**

Adminiſtration and Adminiſtrator. Vide plus Title **Executor.**

An Adminiſtrator ſince the Statute of *Edw.* 3. and before that of *Car.* 2. had all the Power of an Executor, and conſequently was not compellable to make Diſtribution amongſt the next of Kin, but the latter of theſe Statutes directs a Diſtribution. 8, 49

One dies inteſtate, leaving an Aunt and a Grandmother, the latter is nearer of Kin than the Aunt, and entitled to Adminiſtration. 41

Adminiſtration committed, tho' contrary to the Statute of *H.* 8. is not void, but voidable. 43

An Adminiſtration granted by the Arch-deacon or Ordinary, where there are *Bona notabilia* in divers Dioceſes, is merely void. 767

Advancement. Vide *Reſulting Truſt*, &c. under Title **Truſt,** alſo Title **Cuſtom of** London.

Affidavit or Oath.

Bill will not lie to perpetuate Teſtimony, *&c.* before Trial, unleſs

unleſs Affidavit be made of the Witneſſes being infirm and unable to travel. *Page* 117

A Peer of the Realm is to put in his Affidavit upon Honour, but his Anſwer to Interrogatories and Examination as a Witneſs muſt be upon Oath. 146

Where in an Inferior Court I am ſued for a Matter out of the Juriſdiction, if in Vacation Time, a Prohibition may be had in Chancery, on Affidavit that the Matter is out of the Juriſdiction; but no Affidavit is neceſſary where on the Face of the Declaration the Matter appears to be out of the Juriſdiction. 476

Age. Vide **Infant.**

Agreement.

On Caſualties happening between the Articles for a Purchaſe and the Sealing of the Conveyance, who ſhall bear the Loſs. 61

One articling to leave his Wife 1000 *l.* within three Months after his Death, cannot be enforced in Equity to amend the Security. 107, 460

Where Money is agreed to be laid out in Land, the Party, who would have the ſole Intereſt in the Land when bought, may (if of Age) have the Money paid to him. 130

But a Perſon entitled only to an Eſtate-tail in the Land ſhall not have the Money, becauſe of the Remainderman's Chance. *Page* 471

One ſettles Lands on Marriage on himſelf and Wife and firſt Son, *&c.* and makes over Bankers Aſſignments on the ſame Truſts, and if the Annuities are redeemed, the Money to be inveſted in Land, and ſettled to the ſame Uſes; theſe Annuities ſhall go to the Heir, and not to the Executor. 205

One agrees for a valuable Conſideration to convey Lands to *J. S.* and afterwards confeſſes a Judgment to *J. N.* if the Conſideration Money paid by *J. S.* be any ways adequate to the Value of the Land, it binds the Land in Equity, and ſhall defeat the Judgment; *ſecus* of a Mortgage, or if the Conſideration were not adequate. 277

One agrees before Marriage to ſettle certain Lands on his Wife for Life, and afterwards deviſes theſe Lands for Payment of his Debts, the Covenant is a ſpecific Lien on the Lands; *ſecus* had it been only an Agreement to ſettle ſo much *per Annum*, without mentioning any Lands in certain. 429

A Bill in Equity will not lie for a ſpecific Performance of an Agreement to transfer *South-Sea* Stock; *ſecus* where the Thing contracted for may be particularly commodious to the Party. 570

Vide infra *Where an Agreement is to be performed in* Specie, *and where not.*

One for a valuable Conſideration contracts to become a Freeman of *London*, but dies before he has taken it up; his perſonal Eſtate ſhall be divided as if he had been a Freeman, but his Children not to be City Orphans. *Page* 710

See Title **London**.

Agreement parol, Statute of Frauds and Perjuries.

An Agreement made by the Husband before Marriage, without Writing, that the Wife's Eſtate ſhould be all of it enjoyed by her to her ſeparate Uſe, is within the Statute of Frauds. 618

One alters a Draught with his own Hand, this is not a Signing to take it out of the Statute of Frauds, though the Seller afterwards executes the Conveyance and (the Eſtate being in *Middleſex*) cauſes it to be regiſtered. 770

Agreement under Hand.

The Father covenants to ſettle an Eſtate on the Marriage of his Son, who privately agrees to repay ſo much out of it to the Father; the Heir being in ſuch Caſe under the Awe of his Parent, and ſuppoſed not to act freely, Equity will relieve againſt this private Agreement. 121

A Son on his Marriage is to have 3000 *l.* Portion with his Wife, and privately, and without Notice to his Parents who treated for the Marriage, gives a Bond to the Wife's Father to pay back 1000 *l.* of the Portion ſeven Years afterwards; this Bond void in Equity, and will not be made better by being aſſigned to Creditors. *Page* 496

If on the Conſent of a Wife and her Truſtees, and in order to a Compoſition with the Husband's Creditors, the Court orders Part of the Truſt-Money to be paid to the Creditors, they conſenting to diſcharge him of the Debts; any private Notes, *&c.* taken by any of the Creditors for Part of their Debts, beyond their Share with the reſt of the Creditors, will be ſet aſide. 768

See more under Title *Marriage-brocage Bonds*.

Agreement when to be performed in Specie, *and when not.*

By a Settlement *A.* is made Tenant for Life, Remainder to the Heirs of his Body by his Wife, and in the ſame Deed *A.* covenants not to ſuffer a Recovery, but that the Lands ſhall be enjoyed according to thoſe Limitations; afterwards *A.* ſuffers a Recovery and deviſes theſe Lands; on a Bill brought for a ſpecific Performance of the Covenant, it was decreed that the Lands deviſed

deviſed were not affected, though the Covenant was good to bind the Aſſets, and ſuch Covenant being at firſt accepted, Equity ought not to vary or alter it. *Page* 107

See alſo 461

A Bill in Equity will not lie for a ſpecific Performance of an Agreement to transfer *South-Sea* Stock. 570

Agreement on Marriage.

In Marriage Articles to ſettle Lands on the Huſband for Life, Remainder to the Heirs or Heirs Male of his Body, a Court of Equity will decree the Conveyance to be made in ſtrict Settlement according to the Intent of the Parties, (*viz.*) to the Huſband for Life, Remainder to the firſt and every other Son in Tail, *&c.* and not direct an Eſtate-tail to the Huſband, according to the legal Operation of the Words. 106, 143, 291, 622

Articles and a Settlement mentioned to be made in Purſuance thereof were both made before Marriage, but the Settlement varied from the Uſes in the Articles; decreed to go according to the Articles. 123

Amendment.

On a Bill brought by the next of Kin of the Teſtator againſt an Executor for an Account of the Surplus, the Executor anſwered and waived the Benefit of the Surplus by Miſtake of the Law in that Point, and though he afterwards proved it to have been the Teſtator's Intent that he ſhould have the Surplus, yet denied to amend his Anſwer. *Page* 300

On a Plea in Abatement for want of proper Parties, it is in the Power of the Court to diſmiſs the Bill without Prejudice, or to give Leave to amend on Payment of Coſts. 428

Anſwer.

In what particular Caſes the Anſwer of one Defendant ſhall be read againſt another. 300

Vide alſo Title **Evidence.**

On a Bill brought by the next of Kin of the Teſtator againſt an Executor for an Account of the Surplus, the Executor anſwered and waived the Benefit of the Surplus by Miſtake of the Law in that Point, and though he afterwards proved it to be the Teſtator's Intent that he ſhould have the Surplus, yet denied to amend his Anſwer. *ibid.*

After a Decree *Niſi Cauſa* againſt an Infant, on ſuch Infant's coming of Age, and before the Decree made abſolute, he may put in a new Anſwer. 504

A. while beyond Sea ſues *B.* at Law, *B.* brings his Bill againſt *A.* the Court will order, that Service on *A.*'s Attorney ſhall be good Service, but not that ſuch Attorney ſhall put in an Anſwer without Oath. *Page* 523

Qu. If the Defendant were in an Enemy's Country, where no Commiſſion could go to take the Anſwer. *ibid.*

Annuity.

Where an Annuity is payable half-yearly, (*viz.*) at *Lady-day* and *Michaelmas*, and the Annuitant dies on *Michaelmas-day*, but after Sun-ſet, his Executors ſhall have the half Year's Arrear of ſuch Annuity. 179

Exchequer Annuities mortgaged may be ſold upon Notice without a Foreclosure. 261

Where the Arrears of an Annuity or Rent-charge ſhall carry Intereſt, and from what Time. 541

One deviſes an Houſe to his Couſin, directing that an Annuity of 1200*l.* *per Annum* ſhall be paid to her, and that ſhe ſhall maintain her Son there; the Son chuſes to go from her, ſtill the Couſin ſhall have her Annuity in the ſame Manner as if the Son had died. 604

Appeals.

On the Plaintiff's Petition to re-hear, the Cauſe is open as to the whole and every Part of it with Reſpect to the Defendant; while as to the Plaintiff it is open only with Regard to thoſe Things which are complained of in the Petition. *Page* 300

No Words in a Grant from the Crown can deprive a Subject of his Right to appeal; much leſs if the Grant be ſilent in that Particular. 329

An Appeal lies from a Decree in the *Iſle of Man* to the King in Council. *ibid.*

Appointment. See more Title **Power and Deed.**

An Appointment of an Annuity to be paid out of an Office, if voluntary, is countermandable. 101

Apportionment. See **Average,** alſo **Rent.**

Articles. See **Agreement.**

Aſſent and Conſent. See **Legacy.**

Executor compellable in Equity to give his Aſſent to a Legacy. 287

Aſſets. See more under Title *Heir and Executor.*

A. by Will deviſes Land to Truſtees and their Heirs, in Truſt that the Profits ſhould be equally divided between his Wife and Daughter (the

Heir of the Teſtator) during the Wife's Life, and after her Death he deviſes the ſame to the Uſe of his Daughter in Tail, with Remainder over; the Daughter dies without Iſſue and Inteſtate during the Mother's Life; reſolved by all the Judges of *C. B.* (to whom it was referred out of Chancery) that the Mother and Daughter were Tenants in Common, and that the Mother ſhould have a Moiety of the Profits during her Life; the other Moiety by the Statute of Frauds and Perjuries to go to the Adminiſtratrix of the Daughter, and be Aſſets in her Hands, as before that Statute it would have been liable to Occupancy. *Page* 34

The Husband borrows Money, and he with his Wife levies a Fine of the Wife's Lands as a Mortgage for it, after which the Husband gives Legacies and Charities to the amount of his perſonal Eſtate, and dies; the Mortgage ſhall be paid out of his perſonal Aſſets, though the charitable Legacies will be thereby loſt. 264

See alſo Eſtates and Intereſts of the Wife under Tit. **Baron and Feme.**

Executors, in Equity as well as at Law, may prefer any Creditor in equal Degree, or after an Action at Law brought by one Creditor, may confeſs Judgment to another. 295

Where a Feme Sole ſeiſed mortgages, and marries *B.* and the Mortgage is aſſigned to *B.* who in the Aſſignment covenants to pay the Money, and dies, his perſonal Aſſets are not liable in Equity to pay the Mortgage Money. *Page* 348

A Mortgage comes to an Executor who receives the Money due thereon, and pays it away to his Teſtator's Creditors; and then it appears that the Mortgage has been already ſatisfied; the Executor muſt refund tho' he had before paid the Money away in Debts, which there were not otherwiſe Aſſets to ſatisfy. 355

Aſſets marſhal'd, and in what Order Debts are to be paid.

Where a Husband receives Money, which by his Marriage Articles was covenanted to be laid out in Land and ſettled, and afterwards miſapplies it, his Aſſets are liable to make good this Loſs, not as a Breach of Truſt, or as Money received and miſapplied, but as a Debt by Specialty. 131

One ſeiſed in Fee owes Debts by Bond, and deviſes Lands to his Heir in Tail, and gives ſeveral Legacies, after which he dies, leaving the Heir his Executor; the Heir with the perſonal Eſtate pays off the Bond-Debts, by which Means there are not Aſſets to pay the Legacies; the Legatees bring

bring their Bill, praying to ſtand in the Place of the Bond-Creditors, and to be paid out of the Land deviſed to the eldeſt Son. The Court held the Legatees to be without Remedy, the Land being (ſpecifically) deviſed in Tail to the Heir; otherwiſe had the Land deſcended to ſuch Heir in Fee. *Page* 201, 678, 730

So tho' the Court will marſhal the Aſſets in Favour of a Simple Contract Creditor, and (generally ſpeaking) in Favour of a Legatee, yet where ſuch Legatee is a pecuniary one, he will not be relieved, by being permitted to come in the Place of the Bond-Creditors upon the Land in the Hands of a Deviſee thereof. 204, 678

See alſo *Specific Legacy.*

A Recognizance not inrolled or not regularly taken ſhall be looked upon as a Bond, and paid as a Debt by Specialty. 336, 340

One gives Legacies by his Will, and other Legacies by his Codicil, charging his Lands only with the Legacies in the Will; on the perſonal Eſtate's being inſufficient to pay all the Legacies, the Lands ſhall be charged with the Legacies in the Will, and the Legacies in the Codicil be paid out of the perſonal Eſtate. 422

Where one deviſes his Lands for Payment of Debts, Bonds and Simple Contract Debts ſhall be paid equally; but if he only charges his Lands with the Payment of his Debts, letting them deſcend ſubject thereto, the Bonds ſhall be preferred. *Page* 430

But if the Heir ſells the Land before Action brought, then both to be paid equally. 431

See alſo Tit. **Securities and Incumbrances.**

Aſſets by Deſcent and in the Hands of the Heir.

One ſeiſed of Lands in Fee binds himſelf and his Heirs in a Bond, and dies, having deviſed his Lands to *J. S.* in Fee; in a Bill brought by the Obligee to ſubject the Land deviſed, the Deviſor's Heir muſt be made a Party. 99

One ſeiſed in Fee mortgages to *A.* and afterwards binds himſelf and his Heirs to *A.* and dies; if the Heir comes to redeem this Mortgage, he muſt pay the Bond-Debt as well as the Mortgage. 775

An Heir in Action brought on his Anceſtor's Bond muſt be ſued as for his own Debt in the *Debet & Detinet.* 776

See alſo Tit. **Mortgage, Redemption, Foreclosure.**

Aſſignment and Aſſignee.

Debts due to a Feme Sole, who afterwards marries, and her Husband becomes a Bankrupt, are, though unrecovered, aſſignable by the Commiſſioners, by the 4 & 5 *Ann. cap.* 17. 249

In like Manner Debts due to the Wife *dum ſola*, though unrecovered, are, on the Huſband's Bankruptcy, aſſignable by the Commiſſioners. *Page* 249

See alſo Tit. **Baron and Feme.**

A Son on his Marriage is to have 3000 *l.* Portion with his Wife, and privately and without Notice to his Father or Mother, who treated for the Marriage, gives a Bond to the Wife's Father to pay back 1000 *l.* of the Portion ſeven Years afterwards, and the Obligee aſſigns the Bond to a Creditor; the Bond being void in Equity, ſuch Aſſignment ſhall not make it good. 496

See alſo *Marriage-brocage Bonds.*

One having a Bond receives the Money due upon it, and afterwards aſſigns it for a valuable Conſideration as unſatisfied to another, a Purchaſer can have no avail of this Bond. 497

A Deviſee in Remainder of a Term articles for a valuable Conſideration to ſell it, this is a good Aſſignment in Equity, and the Deviſee in Remainder is afterwards but a Truſtee for the Purchaſer. 574

See alſo Tit. **Poſſibility**, and **Will.**

Attainder.

An Attainder of Major General *Thomas Gordon*, Laird of *Auchintoule*, will not extend to attaint the Party, if his Name be *Alexander* and not *Thomas*, tho' the Reſt of the Deſcriptions agree. *Page* 612

Guardians are recommended by Will to act with the Advice of *J. S.* and *J. S.* is afterwards attainted, this Superintendency devolves upon the Great Seal. 706

Attorney and Solicitor.

A. being beyond Sea, ſues *B.* at Law, *B.* brings a Bill in Equity againſt *A.* Court will order that Service on the Defendant's Attorney at Law ſhall be good Service, but not that ſuch Attorney ſhall put in an Anſwer for him without Oath. 523

So if there had been a general Letter of Attorney to appear in and defend Suits, the Court would have ordered ſuch Attorney to appear for the Principal, and that Service on him ſhould be good Service. *ibid.*

Upon the Attorney's or Solicitor's appearing to be guilty of a groſs Neglect, the Court will order him to pay the Coſts. 593

Average and Contribution.

One ſeiſed in Fee of ſome Lands, and poſſeſſed of Leaſes for Years of other Lands, deviſes the Fee to *A.* and the Leaſes to *B.* and dies indebted

debted by Bond; on a Deficiency of Aſſets both the Deviſees ſhall contribute in Proportion to the Value of the reſpective deviſed Premiſſes towards Payment of the Bond-Debts; but if the Deviſe had been to *A.* of all the reſt of the Teſtator's Eſtate, then *A.* ſhould have paid the Debts. *Page* 404

One ſeiſed in Fee of the Manors of *A.* and *B.* mortgages *A.* for 4000*l.* and by Will charges all his real Eſtate with the Payment of his Debts, and deviſes *A.* to *C.* and *B.* to *D.* and dies; the Deviſee of *A.* ſhall compel the Deviſee of *B.* to contribute to pay the Mortgage on *A.* but if the Will proves void, then no Contribution. 505

Bail.

SUING the Bail pending a Writ of Error in Parliament is a Contempt and Breach of Privilege. 685

Bankrupt.

A Creditor by Statute of *J. S.* if *J. S.* becomes Bankrupt, and the Statute be not ſued and executed before the Bankruptcy, ſhall come in only *pro ratâ*, though there were Lands in Fee bound by the Statute. 92

A. lends Money to *B.* and *C.* on Bond, *B.* becomes Bankrupt, and his Eſtate is aſſigned by the Commiſſioners, *A.* ſues *C.* and takes him in Execution on a *Ca' Sa'*, and afterwards conſents to his Eſcape; yet *A.* ſhall come in as a Creditor of *B.* the Bankrupt for a Moiety of his remaining Debt. *Page* 238

The Wife *dum ſola* enters into a Bond and then marries, after which the Husband becomes a Bankrupt; this Debt by Virtue of the Statute of 4 & 5 *Annæ*, *cap.* 17. is diſcharged by ſuch Bankruptcy. 249

In like Manner Debts due to the Wife *dum ſola*, tho' unrecovered, are, on the Husband's Bankruptcy, aſſignable by the Commiſſioners. *ibid.*

See **Baron and Feme.**

The Plea on the Statute of the 4 & 5 *Annæ*, relating to Bankrupts, and their Diſcharge, muſt conclude to the Country. 258

A ſingle Creditor to whom 100*l.* was due from *A.* by two Notes, and 53*l.* Part thereof not yet payable, (before the 5 *Geo.* 2.) ſued out a Commiſſion of Bankruptcy, ſuch Commiſſion ſet aſide as irregular. 260

So alſo of a Bond, where the Obligee took out a Commiſſion before the Day of Payment. 610

A. ſurrenders a Copyhold by way of Sale or Mortgage, but the Surrender is not preſented as it ought to have been, after which *A.* becomes a Bankrupt; the Copyhold is bound by the Surrender and not

not liable to the Bankruptcy. *Page* 280

A Bankrupt though in Poſſeſſion, yet if impowered to diſpoſe of Goods in Truſt for another, they are not liable to the Bankruptcy either in Law or Equity. 314

Husband before he has received the Wife's Fortune becomes a Bankrupt, the Aſſignee ſhall not receive it without making ſome Proviſion for the Wife. 382

A Poſſibility of Right belonging to a Bankrupt is not aſſignable by the Commiſſioners. 385

Commiſſioners, after they have made an Aſſignment of the Bankrupt's Effects, and given him his Certificate and Diſcharge, cannot make a ſubſequent Aſſignment. 386

A Feme Sole mortgages in Fee, marries, and the Husband becomes a Bankrupt and dies, the Aſſignees of the Bankrupt, and not the Wife, are entitled to the Mortgage; *ſecus* if by Articles before Marriage it was agreed that this ſhould continue to the Wife. 458, 461

See Title **Baron and Feme.**

Though a Creditor comes into a Commiſſion of Bankruptcy, proves his Debt, and is prevailed on to be an Aſſignee (being informed that otherwiſe he ſhould loſe his Debt) yet if the Bankrupt has no Eſtate, the Creditor may take the Bankrupt in Execution if he will waive any Benefit of the Statute. 560

The Reaſon of a Creditor's coming in under a Commiſſion of Bankruptcy, and proving his Debt, may be to oppoſe the Bankrupt's being diſcharged. *Page* 562

No Election, in caſe of a Creditor's coming in under the Commiſſion, to be paid out of the Bankrupt's Effects, if no Effects. *ibid.*

Argument of Fraud, if the Commiſſion be ſued out by the Bankrupt's Father in order to diſcharge the Bankrupt. 563

A Bankrupt's Wife cannot be examined againſt her Husband to prove his Bankruptcy, though by the Statute of 21 *Jac.* 1. ſhe be made examinable touching the Diſcovery of her Husband's Effects. 611

By 5 *Geo.* 1. *cap.* 24. a Bankrupt may be examined touching his own Bankruptcy. *ibid.*

If one of the Reaſons for the Commitment of a Bankrupt be illegal, and the Party to continue in Cuſtody till ſomething which is illegally required of him be done, the whole Commitment is naught. *ibid.*

Creditors of a Bankrupt who come into the Commiſſion ſhall not impriſon the Bankrupt for not paying the Debt. 612

A Creditor petitions againſt the Allowance of the Bankrupt's Certificate, upon which the Bankrupt gives him a Bond for Payment of his whole Debt in Conſideration of ſuch Creditor's with-drawing his Petition; Equity will not relieve againſt ſuch Bond. 620

A Trader ſeiſed of Lands in Fee gives Judgment to *B.* and then ſells the Land to *C.* and afterwards becomes a Bankrupt; tho' the Judgment Creditor cannot come in for more than his Proprotion with the Reſt of the Bankrupt's Creditors, whether he may not extend the Lands in *C.* the Purchaſer's Hands, *C.* having purchaſed before the Bankruptcy, and this not prejudicing the Creditors. So if *A.* the Trader gives Judgment to *B.* and articles for a valuable Conſideration to ſell to *C.* and then becomes a Bankrupt; it ſeems the Judgment ſhall bind the Lands in the Hands of *C.* who articled to buy them; but whatever Money the Purchaſer was to pay the Bankrupt, the ſame ſhall be liable to the Bankruptcy. *Page* 737

Bankrupt, before his Bankruptcy gave a Note to *A.* for 100*l.* payable to *A.* or Order, *B.* buys in the Note for 50*l.* yet *B.* is a legal Creditor for 100*l.* and may ſue out a Commiſſion againſt the Bankrupt; *ſecus* of an Aſſignee of a Bond, he not being the legal Creditor, or if the Indorſement were after the Bankruptcy. 782

Bargains catching. See **Heir.**

Baron and Feme.

A perſonal Eſtate was deviſed to a Feme Covert for her ſeparate Uſe without naming Truſtees, this, by the Opinion of Lord *Cowper*, not good to exclude the Husband from intermeddling. *Page* 125
Quære tamen.

What Circumſtances will undoubtedly make ſuch Will good. 126

Debts of the Wife contracted *dum ſola* are diſcharged by the Bankruptcy of the Husband, as on the other Hand Debts due to the Wife *dum ſola* are aſſignable on the Bankruptcy by the Commiſſioners. 249

Debts due to the Wife *dum ſola*, forfeited and aſſignable to the King by the Husband. 253

The Wife is for ever diſcharged by the Diſcharge of the Bankrupt Husband. 257

Husband borrows Money, and he and the Wife levies a Fine of the Wife's Land as a Mortgage for it, after which the Husband by Will gives Legacies and Charities to the Amount of his perſonal Eſtate and dies; the Mortgage Money ſhall be paid out of his perſonal Aſſets, though to the Defeating of the Charity Legacies. 264

But all the Husband's Debts, even thoſe by Simple Contract, ſhall be preferred to the Mortgage. *ibid.*

Where a Feme Sole ſeiſed mortgages, and marries *B.* and the Mortgage is aſſigned, and *B.* in the Deed of Aſſignment covenants to pay the Mortgage Money, his perſonal Eſtate is not liable in Equity to pay the ſame, unleſs he received it. *Page* 348

Feme Covert poſſeſſed of *Choſes en Action* dies, her Husband adminiſters, and makes a voluntary Aſſignment, this is an Alteration of the Property. 378

So if the Husband had ſurvived, and then had died without altering the Property, or ſo much as adminiſtring to his Wife. *ibid.*

Husband before he has received the Wife's Fortune becomes a Bankrupt, the Aſſignee ſhall not receive the ſame without making ſome Proviſion for the Wife. 382

A Feme Sole Mortgagee in Fee, marries, and the Husband becomes a Bankrupt and dies, the Aſſignees of the Bankrupt, and not the Wife, are entitled to the Mortgage; *ſecus* if by Articles before Marriage it was agreed that this ſhould continue to the Wife. 458, 461

Feme Sole owes Debts by Bond, and having married dies leaving no *legal* Aſſets, but at the Marriage had a Term for Years, Jewels, *&c.* in Conſideration of which the Husband makes no Settlement; the Husband not liable in Equity any more than at Law. 466

Husband during the Coverture liable for all his Wife's Debts, though he had nothing with her; and on the other Hand, though he had a Portion in Goods, Jewels, or other perſonal Eſtate with his Wife, yet if he happens not to be ſued for her Debts during the Coverture, he will not be liable afterwards. *Page* 469

Baron gives Feme the Foul Diſtemper, *A.* lends the Wife 30*l.* to pay the Doctor for her Cure, Baron deviſes Lands for the Payment of his Debts; this 30*l.* is a Debt of the Husband's, and *A.* is a Creditor in the Doctor's Place. 482

Though a Wife cannot at Law borrow Money even for Neceſſaries, ſo as to bind her Husband; yet if ſuch Money is applied to the Wife's Uſe for Neceſſaries, the Lender of the Money ſhall in Equity ſtand in the Place of him who found the Neceſſaries. 483

How far the Husband is anſwerable for the Debts of the Wife, vide ſupra under **Baron and Feme.**

Bail or Surety.

Suing the Bail below, pending a Writ of Error in Parliament, is a Contempt and Breach of Privilege. 685

Baſtard.

If Lands are deviſed to a Baſtard and his Heirs, though he can have no Heirs but ſuch as is his Iſſue, yet it is a Fee-ſimple. 78

One deviſes 3000 *l.* to all the natural Children of his Son by *Jane Stiles*, the Baſtards born after the making of the Will ſhall not take, nor even the Child *in Ventre ſa mere*, Baſtards being incapable of taking till they have gained a Name by Reputation. *Page* 529

And though in the principal Caſe the Money was to be paid by the Executors as the Teſtator by Deed ſhould appoint, and the Teſtator afterwards made a Deed of Appointment, yet ſuch Deed referring to the Will was held as Part thereof. 530

Bill.

Who muſt be Parties, vide Tit. **Parties.**

A Bill brought by a Bond-Creditor againſt a Deviſee on the Statute of fraudulent Deviſes muſt make the Heir a Party. 100

A Bill lies to perpetuate Teſtimony before Trial, on Affidavit annexed. 117

A. brings his Bill againſt *D.* and *C.* who put in inſufficient Anſwers, and prefer their Croſs Bill againſt *A.* *B.* becomes a Bankrupt, his Aſſignees bring a Bill in Nature of a Bill of Revivor againſt *A.* they ſhall not go on till *C.* has anſwered *A.*'s Bill. 266

A Bill does not lie for an Owner of a Quit-Rent, in order to ſettle what Proportion his Quit-Rent ſhall pay to the Land-Tax. 329

Bond or Obligation.

By a Deviſe of all one's Goods a Bond will paſs. *Page* 267

Bond or Covenant to pay a Sum of Money on Failure of Iſſue of *A.* generally is good. 566

A Son in plentiful Circumſtances gives his Father a Bond to pay him 120*l.* Annuity for his Life; this, if done freely and without Coertion, good; and what Words or Circumſtances will not be conſtrued a Coertion. 607

A Bond is given to a Creditor, who had petitioned againſt the Allowance of the Bankrupt's Certificate, to pay the whole Debt in Conſideration of the Creditor's with-drawing his Petition; Equity will not relieve againſt it. 620

Marriage-brocage Bonds. Vide **Marriage.**

Borough Engliſh.

One ſeiſed of a Copyhold in Fee in Nature of *Borough Engliſh* has five Sons, the youngeſt of whom dies leaving Iſſue a Daughter, and then the Father dies, the youngeſt Son's Daughter is inheritable. 63

The Cuſtom of a Manor was, that the Copyhold Lands of any Tenant dying *ſeiſed* ſhould deſcend to his youngeſt Son, and a Surrender is made

made of a Copyhold to the Uſe of *J. S.* and his Heirs, who dies before Admittance, his eldeſt Son, and not his youngeſt, ſhall take theſe Lands; *ſecus* had it been laid to have been of the Nature of *Borough Engliſh.* *Page* 66

One having *Borough Engliſh* Lands is diſſeiſed and dies, this Right to the *Borough Engliſh* ſhall deſcend to the youngeſt Son. 67

Caſualties.

On Caſualties happening between the Articles for a Purchaſe and the Sealing of the Conveyance, who ſhall bear the Loſs. 61

Where a former Will of Land is cancelled by the Teſtator upon a Preſumption that a latter Will is good and duly executed, which proves not to be ſo, in ſuch Caſe Equity will relieve under the Head of Accident. 346

Charity and charitable Uſes. See alſo **Poor.**

A Deviſe by a Nuncupative Will by Tenant in Tail of a Rent out of Lands to a Charity, void. 247

Vide **Deviſe,** and **Will.**

Deviſe by Tenant in Tail to a Charity good, tho' no Fine levied, or Recovery ſuffered previous thereto. 248

Charity Legacies that are pecuniary, ſhall on a Deficiency of Aſſets come into Average as well as other pecuniary Legacies. *Page* 423

In a Suit for a Charity for the Arrears of a Rent-charge, it is not neceſſary to make all the Ter-tenants of the Land, out of which the Rent iſſues, Parties. 599

See alſo Tit. **Parties.**

A Pariſhioner no good Evidence to prove a Charity given to the Pariſh; *ſecus* if only a Lodger, and one who does not pay to the Poor. 600

See alſo Tit. **Evidence.**

Two Schools in one Town, the one a Free, the other a Charity School for Boys and Girls; *A.* deviſes 500 *l.* to the Charity School, though both be Charity Schools, yet only that for Boys and Girls ſhall take. 674

One ſeiſed of ſome Lands in Fee, and being *Ceſtui que Truſt* of other Lands, deviſes all to *A.* for Life, Remainder to his firſt and ſecond Son in Tail Male (without going farther) and after *A.*'s Death without Iſſue Male, then to a Charity though *A.* be Tenant in Tail until Iſſue born, and may bar the Charity with reſpect to thoſe Lands of which he has the legal Eſtate, yet it was held otherwiſe as to the Truſt Eſtate. 754

Children and younger Children. See **Portions.**

Com-

Committee.

Committee of an Infant Heireſs having given a Recognizance that he ſhould not ſuffer the Infant to marry without the Conſent of the Court, the Form of this Recognizance moderated, *viz.* that the Infant ſhall not marry with the Committee's Privity, without the Conſent of the Court. *Page* 698

Common Recovery. Vide **Recovery.**

Tenancy in Common. Vide **Jointenants.**

Concealment, Covin, Colluſion.

A Deviſee under a Will defectively executed repreſents it to be duly executed, and for a ſmall Sum gains a Releaſe from the Heir, ſuch Releaſe ſet aſide. 239

Where the firſt Mortgagee is a Witneſs to the ſecond Mortgage, though there be no actual Proof of his knowing the Contents thereof, yet from a Preſumption that he might have known the ſame, this ſhall poſtpone him. 394

Condition.

One deviſes Lands to his Wife for Life, and after her Death to his Son in Fee, upon Condition to pay his Daughter 1000 *l.* within a Year after the Death of *J. S.* with a Proviſo, that if the Money be not paid, the Daughter may enter and receive the Profits till Payment; *J. S.* dies, living the Wife; the Daughter is entitled to the 1000 *l.* and in Default of Payment a Sale of the Reverſion will be decreed. *Page* 478

Condition precedent.

One by Will gives an Annuity to his Grandaughter; but if ſhe marries with the Executor's Conſent, then a Portion; ſhe marries *ſans* Conſent a Man worth nothing; the Husband not entitled to the Money, the having married with the Executor's Conſent being a Condition precedent to the Gift of the Portion. 284

Condition or Covenant broken, and how far relievable.

Mortgagor reſerving ſix *per Cent.* with Proviſo to take five if paid within three Months after; if a great Arrear, the Court will not relieve; *ſecus* if but a ſmall Slip of Time. 652

Vide Tit. **Intereſt of Money.**

Contingent Remainders. Vide **Truſtees for preſerving contingent Remainders.**

Contribution. Vide **Average.**

Convocation.

The Canons of a Convocation do not bind the Laity without an Act of Parliament. *Page* 32

Copyhold.

Copyhold Lands do not differ in Conſtruction of Law from Freehold, and Surrenders of Copyholds muſt be governed by the ſame Rules as Conveyances at Common Law. 16

If a Copyhold be deviſed to Grandchildren without any previous Surrender, Equity will ſupply the Want thereof. 61

Surrender of a Copyhold to the Uſe of Baron and Feme for their Lives, *& Hæredum & Aſſignatorum* of the ſaid Baron and Feme, and for Default of ſuch Iſſue, to the right Heirs of *A.* this is an Eſtate in Fee, and not an Intail in the Baron and Feme; otherwiſe had it been the Caſe of a Will. 71

A. ſurrenders a Copyhold by way of Sale or Mortgage, but the Surrender is not preſented in Time, and *A.* becomes a Bankrupt; this will bind the Sale in Equity. *Page* 280

If a Copyholder ſues in the Lord's Court by Petition, and thereupon a wrong Judgment is given, though no Appeal or Writ of Error will lie of ſuch Judgment, yet the Court of Chancery will correct the Proceedings. 330

Voluntary Conveyance of a Copyhold or other Eſtate not helped in Equity againſt an Heir. 354

One deviſes all his real Eſtate to pay Debts, having Part Freehold and Part Copyhold, and dies without having ſurrendered the Copyhold to the Uſe of his Will; if the Freehold Eſtate be not ſufficient to pay Debts, the Copyhold, being real Eſtate, ſhall be liable. 443

A Copyhold was granted to the Husband and Wife and *J. S.* for their Lives *ſucceſſive*, and the Fine appeared by the Rolls to be paid only by the Husband and Wife; *J. S.* decreed a Truſtee for the Husband and Wife and the Survivor of them. 781

Contempt.

An Advertiſement in the publick Prints, that whoever ſhall diſcover and make legal Proof of a Marriage (in Relation to which there was a Suit depending in this Court) ſhall have 100 *l.* Reward; held to be a Contempt of the Court, and the Party pro-

procuring it committed. *Page* 675

Suing the Bail below, pending a Writ of Error in Parliament, is a Contempt and a Breach of Privilege. 685

A general Act of Pardon, tho' with an Exception of all Contempts then depending, which had been proſecuted at the Charge of any private Perſon, yet held to extend to Contempts in marrying Infant Wards of a Court of Equity. 696

Where the Husband was a Lunatick, the Wife, though an *Iriſh* Peereſs, committed for a Contempt in not producing him. 701

The firſt Proceſs for Contempt againſt a menial Servant of a Peer, is a Sequeſtration *Niſi*. 535

Vide **Proceſs**.

Corporation.

If a Corporation would make uſe of one of their own Members as a Witneſs, they muſt disfranchiſe him. 595

A College reſtrained by their Conſtitution from making any Leaſes except for 21 Years, and at a Rack-Rent, makes Orders, recommending it to their Succeſſors to renew at leſs than the Rack-Rent; this not favoured, as tending to a Breach of the Statutes. 655

The Signing of any Contract for Leaſing (or whereby the Revenues may be affected) by the Maſters and Fellows of the College, unleſs under the College Seal, will not be binding to the College. *Page* 656

Coſts in Equity and Law.

On a *Scire Facias* to repeal a Charter, the Defendant ſhall pay Coſts for a new Trial. 224

Coſts not always to follow the Event of the Cauſe; as where the Money was found due to the Defendant upon Account; yet it appearing to be much leſs than had been claimed by the Defendant's Anſwer, in that Caſe the Defendant was allowed no Coſts. 376

Mortgagee ſhall not onerate his Pledge with Coſts which he has occaſioned by an unjuſt Defence. 395

An Heir at Law, or even an Heir Male to the Honour of the Family, if there be probable Cauſe to contend for the Family Eſtate, not to pay Coſts. 482

See alſo **Heir**.

Upon the Attorney's or Solicitor's appearing to be guilty of a groſs Neglect, the Court will order him to pay the Coſts. 593

Covenant. Vide **Agreement**.

Covenant broken, and how far relievable, vide Tit. **Condition**.

Courts. Vide **Juriſdiction.**

Court of Exchequer.

Upon an Outlawry the Plaintiff in the Action ought to get a Grant or Leaſe of the Defendant's Intereſt under the Exchequer Seal. *Page* 445, 446

Court of Chancery.

Court of Chancery in Vacation-Time may grant Prohibitions returnable in *B. R.* or *C. B.* 43, 476

If a Copyholder ſues in the Lord's Court by Petition, and thereupon a wrong Judgment is given, though no Appeal or Writ of Error will lie of ſuch Judgment, yet the Court of Chancery will correct the Proceedings. 330

An Executor proves a Will, wherein one of the Legacies is forged; this Fraud is not examinable in Chancery. 388

No Motion can be made on the Petty-Bag Side of the Court of Chancery after the laſt Day of the Term, tho' as to other Purpoſes on the Equity Side, the laſt Day of the Term continues till the Motions are over. 522

So where the laſt Seal continued three Days, the Whole was looked upon as a Continuance of the firſt Day of the Seal. *ibid.*

The Court of Chancery only proper to compel an Execution of a Truſt, and conſequently a Diſtribution of the undiſpoſed Surplus of a perſonal Eſtate. *Page* 549

Guardians appointed by Will according to the Statute of 12 *Car.* 2. *cap.* 24. have no more Power than Guardians in Socage, and are but Truſtees, on whoſe Misbehaviour, or giving Occaſion to ſuſpect their Behaviour, the Court of Chancery will interpoſe. 704

If a Father in low Circumſtances endeavours to marry his own Child to one who has an Eſtate not any ways proportionable, the Court of Chancery will interpoſe. 705

Guardians are recommended by Will to act with the Advice of *J. S.* and *J. S.* is afterwards attainted, this Superintendency devolves upon the Great Seal. *ibid.*

Court Spiritual, vide *Spiritual Court.*

Curteſy.

Tenant by the Curteſy.

One ſeiſed of Lands in Fee had two Daughters, and deviſed his Lands to Truſtees in Fee, in Truſt to pay his Debts, and to convey the Surplus to his Daughters equally; the younger Daughter married, and

and died leaving an Infant Son and her Huſband ſurviving; on the eldeſt Daughter's bringing a Bill for a Partition, decreed that the Huſband of the youngeſt Daughter ſhould be Tenant by the Curteſy. *Page* 108

Cuſtoms Foreign. Vide Tit. **Foreign Cuſtoms.**

Cuſtoms of London. *Vide* **London.**

Debts, Creditor and Debtor. Vide *Truſt for Payment of Debts.*

WHERE the Huſband receives Money which by Marriage Articles was covenanted to be laid out in Land and ſettled, and afterwards miſapplies it, his Aſſets are liable to make this Loſs good, not as a Breach of Truſt, or as Money received and miſapplied; but by reaſon of the Articles it is a Debt by Specialty. 131

A Freeman of *London* gives a Note by which he owns himſelf indebted to his Brother and Heir, but his Brother knows nothing of it, and the Freeman keeps this Note always in his own Cuſtody, which on his Death was found among his Papers; adjudged a void Note, and as a Matter *intended* and not *perfected.* *Page* 204

See alſo under Tit. **Voluntary.**

One ſeiſed in Fee of ſome Lands, and poſſeſſed by Leaſe for Years of other Lands, deviſes the Fee to *A.* and the Leaſehold to *B.* and dies indebted by Bond; on a Deficiency of Aſſets, both the Deviſees ſhall contribute to the Payment of the Bonds; but if the Deviſe had been to *A.* of all the Reſt of his Eſtate, then *A.* ſhould have paid all the Debts. 403

Compoſition of Debts.

Equity will aſſiſt a Compoſition of a Debt, if obtained without Fraud and upon a fair Repreſentation. 651

If on the Conſent of the Wife and her Truſtees, and in order to a Compoſition with the Huſband's Creditors, the Court orders Part of the Truſt-Money to be paid to the Creditors thus conſenting to diſcharge him of the Debts, any private Notes, *&c.* taken by any of the Creditors for Part of their Debts beſides their Share with the reſt of the Creditors, will be ſet aſide. 768

The Order and Priority in which Debts are to be paid, vide under Tit. **Aſſets,** and **Executor.**

Decree.

If after a Decree a *Caveat* be entered to ſtay the Signing and Inrolling, it ſtays the Signing twenty-eight Days after the Preſenting the Decree to the *Lord Chancellor* to be inrolled, and Notice given by the *Lord Chancellor*'s Secretary to the Clerk on the other Side. *Page* 609

Where Matters have been examined in Equity and determined, the Court is cautious of unravelling former Decrees, Agreements or Releaſes. 723

On a Bill to ſet aſide a Decree againſt an Infant for Fraud, if the ſame be not fraudulent, though in many Reſpects not ſo equitable, the Court will not ſet it aſide. 734

If after a Decree to account, an Executor or Adminiſtrator does not revive within ſix Years, this is not within the Statute of Limitations. 742

Parties bound or not by a Decree.

A Decree ſhall not bind a Remainder-man who is no Party. 91

After a Decree *niſi Cauſa* againſt an Infant, on ſuch Infant's coming of Age and before the Decree made abſolute, he may put in a new Anſwer. 504

See Tit. **Anſwer.**

Deeds.

Deeds, Conveyances and Aſſurances, Conſtruction and Operation of them.

Deviſe to *A.* (a Woman) for Life, and then to be at her Diſpoſal, provided it be to any of her Children by her firſt Huſband. *A.* with an after-taken Huſband does by Leaſe and Releaſe and Fine convey the Premiſſes to a Truſtee and his Heirs, to the Uſe of herſelf for Life without Impeachment of Waſte, Remainder to her Daughter by a firſt Huſband and the Heirs of her Body, Remainder to her Son by her firſt Huſband and his Heirs; this adjudged a good Execution of the Power. *Page* 149

Deeds or Settlements ſolemnly executed, not to be ſet aſide by the Parties parol Expreſſions declaring againſt it. 482

Deed of Appointment in Conſequence of a Will, and referring thereto, conſtrued as Part of the Will. 530

Deeds loſt or concealed.

Where an Heir ſuppreſſed a Deed or Will, formerly the Court decreed the Party claiming under ſuch Deed, *&c.* to hold and enjoy againſt ſuch Suppreſſor; but now the

Court goes farther, and decrees the Suppreſſor to convey. *Page* 731

The Contents of a Deed or Will ſuppreſſed, if uncertain, to be taken more ſtrongly againſt the Suppreſſor. *ibid.*

Deeds cancelled.

One makes a voluntary Settlement on her Nephew *A.* in which there is no Power of Revocation, keeping the Deed in her Cuſtody; afterwards the Nephew's Father gets an atteſted Copy of this Settlement; then the Aunt burns ſuch Settlement, and ſettles the Premiſſes on her Nephew *B.* delivering the ſaid Settlement into *B.*'s Cuſtody; the Nephew *A.*'s Bill to eſtabliſh the firſt Settlement diſmiſſed with Coſts; upon which the ſecond Nephew *B.* claiming under his Settlement, and bringing a Bill to have the atteſted Copy delivered up, obtains a Decree for that Purpoſe. 577

Deeds obtained by Dureſs, Compulſion, &c.

Husband before Marriage covenants to releaſe the Guardian of the intended Wife of all Accounts; this not binding, from a Preſumption that it was not made freely. 118

Vide *Marriage-brocage Bonds*.

Son in plentiful Circumſtances gives his Father a Bond to pay him 120 *l.* Annuity for his Life, this, if done freely and without Coertion, good; and what Words and Circumſtances will not be conſtrued a Coertion. *Page* 607

Vide ante **Bonds.**

Demurrer.

If one be made a Plaintiff immaterially, and without being any Ways intereſted in the Cauſe, the Court will not make an Order to examine ſuch Perſon *de bene eſſe*, but the Defendant ought to have demurred. 595

Defendants.

In what ſpecial Caſes the Anſwer of one Defendant may be read againſt the other. 300

They only are Defendants to a Bill againſt whom Proceſs is prayed. 593

See alſo **Parties.**

Depoſitions or Examination.

A Witneſs was examined who at that Time was diſintereſted, but afterwards became intereſted and Plaintiff in the Cauſe, his Depoſitions allowed to be read. 288

A Witneſs, ſworn and examined to ſeveral of the Interrogatories, dies ſuddenly before he has ſigned his Examination; theſe Depoſitions no Evidence. 414

Defendant after Publication examines a Witneſs, and on the uſual Affidavit, that neither he, his Clerk or Solicitor had ſeen the Depoſitions, gets an Order to re-examine this Witneſs, but the Witneſs dies before a Re-examination; the Court gave Leave to the Defendant to make Uſe of the former Depoſitions. *Page* 415

Depoſitions de bene eſſe.

Court refuſed to publiſh Depoſitions *de bene eſſe*, in order to compare them with the Depoſitions in the ſame Cauſe taken on an Examination in chief. 567
The Reaſon of examining a Witneſs *de bene eſſe*. 568
Whether a Proſecution for Perjury will lie on a Depoſition taken *de bene eſſe*. *ibid.*

Deſcent. See alſo **Purchaſe.**

Heir not always, and of Neceſſity, to be intended a Word of Limitation. 59
So where the Deviſe was to the Heirs Male of *J. S.* begotten, *J. S.* having a Son, and the Teſtator taking Notice that *J. S.* was then living; this was held a ſufficient Deſcription of the Teſtator's Meaning, and the Son allowed to take, though ſtrictly ſpeaking he was not Heir. 229
All Lands in *England* at firſt deſcended in Gavelkind; but after the Conqueſt when Knight-Service Tenures were introduced, and the whole deſcended to the eldeſt Son, the Daughter of the eldeſt, *Jure repræſentationis*, was preferred to the youngeſt Son. *Page* 64

Deviſe, and Executory Deviſe. Vide **Will.**

Deviſe for Payment of Debts. Vide *Truſts for raiſing Portions and Payment of Debts* under Tit. **Truſt.**

Diſtreſs.

For the incouraging of Purchaſers of Fee-Farm Rents, the Statute of 22 *Car.* 2. *cap.* 6. gives the Purchaſers the ſame Power of Diſtreſs which the King had, (*viz.*) not only on the Lands charged, but on any other of the Lands belonging to the Tenant. *Quære autem*, if ſuch Grantee of a Fee-Farm Rent may diſtrain on other Lands of the Tenant under Sequeſtration. 307

Diſtribution.

Who ſhall be preferred with regard thereto.

Where an Executor has an expreſs Legacy, the Court of Chancery looks upon him but

but as a Truſtee with regard to the Surplus, and will decree the ſame to go according to the Statute of Diſtribution. *Page* 7

So though the next of Kin has a Legacy alſo. 544

Inteſtate dies leaving a deceaſed Brother's Child and a deceaſed Brother's Grandchild, the Grandchild not admitted to any diſtributory Share. The Clauſe in the Statute of 22 *&* 23 *Car.* 2. *cap.* 10. which ſays, that there ſhall be no Repreſentatives among Collaterals beyond Brothers and Siſters Children, being to be intended that none ſhall take by Repreſentation but the Children of Brothers and Siſters to the Inteſtate. 25, 594

One dies inteſtate, leaving an Aunt and a Grandmother, his next of Kin; the Aunt not entitled to come in for a diſtributory Share with the Grandmother. 41

On a Son's dying inteſtate, and without Wife or Iſſue, the Father is at this Day entitled to the whole perſonal Eſtate, though by the firſt of *Jac.* 2. the Mother has but an equal Share with the Brothers and Siſters. 48, 49

How the Law ſtood formerly with Regard to Diſtribution and Inheritance. 50

Grandfather on the Father's Side, and Grandmother on the Mother's Side, equally entitled by the Statute of Diſtribution. 53

As is alſo the Half Blood with the Whole. *Page* 53

One covenants to leave his Wife 500 *l.* and dies inteſtate, upon which the Wife's diſtributory Share comes to above 500 *l.* this is a Satiſfaction of the Covenant. 324

One deviſes the Surplus of his perſonal Eſtate to his Relations; only ſuch ſhall take as are capable of taking within the Statute of Diſtribution. 327

One dies inteſtate, leaving an Uncle and a deceaſed Aunt's Son, the latter ſhall have no Share under the Statute of Diſtribution. 594

One deviſes the Surplus of his perſonal Eſtate to four equally, and leaving *J. S.* Executor in Truſt; and one of the four dies in the Life of the Teſtator; his Share, as ſo much of the Teſtator's Eſtate undiſpoſed of by the Will, ſhall go according to the Statute of Diſtribution. 700

Donatio Cauſa mortis. Vide **Legacy.**

Dower.

Husband ſeiſed in Fee mortgages for Years, marries and dies; his Wife ſhall be endowed. 121

Legacy to a Wife, in Conſideration that ſhe releaſe her Dower, on a Deficiency of Aſſets,

Aſſets, ſhall be preferred. *Page* 127

A Truſt Term for Years ſhall not, in Equity, hinder Dower. 137

A Jointure made by a Freeman of *London* on his Wife in Bar of Dower, will not extend to bar her of her cuſtomary Part. 530

Ejectment.

MOrtgage in Fee is made redeemable on Payment of 300 *l.* and Intereſt upon any *Michaelmas* Day, on ſix Months Notice; the Remedy in this Caſe, on Default of Payment, is not by *Mutuatus* at Law, or by Bill in Equity, but by Ejectment to recover the Poſſeſſion. 294

Election.

Where Money is agreed to be laid out in Land, the Party who would be entitled to the ſole Intereſt in the Land when bought, may (if not an Infant) elect to have the Money paid him, and that it ſhall not be inveſted in Land. 130, 389, 470

A Man has one Daughter, to whom 8000 *l.* is ſecured by Marriage Settlement, and afterwards he gives her 8000 *l.* by his Will for her Portion, and 200 *l.* *per Ann.* the Daughter ſhall have but one 8000 *l.* though ſhe may elect which of the Portions ſhe pleaſes. *Page* 147

Purchaſer before a Maſter may elect to loſe his Depoſit; in which Caſe he will not be bound to proceed in the Purchaſe. 745

Entry.

The ſame Length of Time ſhall bar a Redemption in Equity, as bars an Entry at Law. 270

Where Lands were deviſed to *A.* for Life, and if *A.* ſhould die leaving Iſſue Male, then to ſuch Iſſue Male and his Heirs for ever; but if *A.* ſhould leave no Iſſue Male, then to *B.* in Fee; and *A.* ſuffered a common Recovery of theſe Lands, and five Years paſſed; held that the right Heirs of the Teſtator were barred, in Regard they ought to have entered upon ſuch Forfeiture, and had no new Title of Entry upon the Death of the Tenant for Life. 520

Error.

Whether Error lies on a Rule or Award of a *Mandamus.* 348

Writ of Error on a Judgment on a *Mandamus* no *Superſedeas* to a peremptory *Mandamus.* 351

Error lies not on a Rule for a Prohibition. *ibid.*

After Judgment in an Action on a Policy of Inſurance, if Error is brought to reverſe ſuch Judgment for want of an Original, the Court will not permit the Plaintiff to file an Original. *Page* 412

Eſtates.

Eſtate in Fee-ſimple.

A Surrender of a Copyhold to the Uſe of Baron and Feme for their Lives, & *Hæredum* & *Aſſignatorum* of the ſaid Baron and Feme; and for Default of ſuch Iſſue, to the right Heirs of *A.* this is an Eſtate in Fee, and not an Eſtate-tail in the Baron and Feme; otherwiſe had it been in the Caſe of a Will. By three Judges of *B. R.* againſt *Gould* J. 70

If Lands are given to a Baſtard and his Heirs, though ſuch Baſtard can have no Heir but of his Body, yet it is a Fee-ſimple. 78

Eſtate in Fee-tail.

A Deviſe by a Father to his ſecond Son and his Heirs for ever, and for want of ſuch Heirs, then to the right Heirs of the Teſtator, is an Eſtate-tail; but had the Deviſe over been to a Stranger, the ſecond Son would have taken a Fee-ſimple, and conſequently the Deviſe over had been void. 23

Deviſe to *A.* for Life, Remainder to his firſt, &c. Son in Tail Male, and ſo on to his ſixth Son; and if *A.* ſhould die without Iſſue Male of his Body, then to *B.* this held to give an Eſtate-tail to *A.* to the End that the ſeventh and other ſubſequent Sons ſhould not be excluded. *Page* 59, 754

So had the Deviſe been to *A.* for Life, and if *A.* died without Iſſue, then to *B.* here the ſubſequent Words would have turned the expreſs Eſtate for Life into an Eſtate-tail. 605

Upon a Settlement *A.* is made Tenant for Life, Remainder to the Heirs of his Body by his Wife *Jane*, and in the ſame Deed covenants not to ſuffer a Recovery, but that the Lands ſhall be enjoyed according to the Limitation; *A.* does ſuffer a Recovery, and deviſes the Lands; this Covenant good to bind the Aſſets; but *A.* being Tenant in Tail, and as ſuch having a Power to ſuffer a Recovery, the Lands deviſed ſhall not be affected. 104

One deviſes Lands for Payment of Debts, and then to *A.* for Life, with Power to make Leaſes, &c. Remainder to the Heirs Male of the Body of *A.* though this be but the Deviſe of a Truſt and Executory, and expreſt to be to *A.* for Life, yet it is an Eſtate-tail in *A.* barrable by a Fine and Recovery; *ſecus* in Caſe of Marriage Articles to ſettle Lands in that Manner. *Page* 142, 290

Deviſe by Tenant in Tail to a Charity, good, tho' no Fine be levied, or Recovery ſuffered previous thereto. 248

Eſtate for Life.

A. deviſed Lands to Truſtees and their Heirs, in Truſt, that the Profits ſhould be equally divided between his Wife and Daughter during the Wife's Life; and after her Death he deviſed the ſame to the Uſe of the Daughter in Tail, Remainder over, the Daughter dies before the Mother; this held to be a Tenancy in Common between the Mother and Daughter during the Mother's Life, and that on the Daughter's Death her Moiety did not reſult to the Heir, but was an Intereſt undiſpoſed of in Nature of a Tenancy *per auter vie*, and belonged to the Daughter's Adminiſtratrix. 34

Deviſe to *A.* for Life, Remainder to his firſt and every other Sons in Tail Male ſucceſſively, and for want of Iſſue Male of *A.* Remainder over; this is only an Eſtate for Life in *A.* even though the Codicil took Notice that the Teſtator had given the Premiſſes to *A.* and the Heirs Male of his Body. 54 *ſed Vide* 605

Deviſe to *A.* for Life, and after his Death to the Heirs Male of his Body, and the Heirs Male of the Body of ſuch Heir Male ſeverally and ſucceſſively, as they ſhall be in Priority of Birth, *&c.* Remainder over; *A.* by the better Opinion, ſeems to be only Tenant for Life. *Page* 87

Deviſe to *Jane Styles* for Life, and then to be at her Diſpoſal, provided ſhe gives the Premiſſes to any of her Children by her firſt Husband; this gives her an Eſtate for Life, with a Power to diſpoſe of the Fee. 149

Deviſe of Land to a Corporation, in Truſt to convey the Premiſſes to the Teſtator's Godſon *A.* for Life, and ſo to his firſt Son for Life, and afterwards to the firſt Son of that firſt Son for Life, then to *B.* for Life, with the like Limitations; this tending to a Perpetuity will not be allowed, but the Conveyance ſhall be made as near the Intent of the Party as the Rules of the Law will admit, *viz.* by making all the Perſons in Being Tenants for Life; but the Limitations to the Sons unborn muſt be in Tail. 332

Eſtate for Years.

How and in what Reſpects a Deviſe of a Term for Years differs from a Grant thereof. 575

One poſſeſſed of a Term for Years, deviſes all the Profits thereof to *J. S.* only the

the Profits accruing from the Death of the Teſtator ſhall paſs. *Page* 503

One deviſes his Lands to his Executors for and until Payment of his Debts; this is but a Chattel Intereſt in the Executors. 509

A. deviſes a Term for Years to *B.* for Life, Remainder to *C.* *C.* in the Life of *B.* deviſes the Remainder of this Term; this is good, and amounts to *C.*'s declaring that his Executors ſhall ſtand poſſeſſed of the Term in Truſt for the Deviſee. 572

So if a Deviſee in Remainder of a Term articles for a valuable Conſideration to ſell it; ſuch Deviſee in Remainder is afterwards but a Truſtee for the Purchaſer, but a voluntary Aſſignment ſeems void. 576

Anciently there were rarely any Leaſes for Years but what were for a ſhort Time; for which Reaſon they were eſteemed to be of leſs Continuance than an Eſtate for Life, and for the ſame Reaſon ſuch Leſſee could not falſify a feigned Recovery. 574

If I deviſe all my real and perſonal Eſtate, and afterwards purchaſe ſome Lands in Fee, and ſome Leaſes for Years, the Leaſes ſhall paſs, but not the Fee-ſimple Lands. 575

Eſtate by Implication. Vide **Implication.**

Term Attendant on the Inheritance.

A. ſeiſed in Fee demiſes to *B.* his Executors, *&c.* for 99 Years, in Truſt for himſelf and his Wife for their Lives, and the Life of the Survivor; and after the Death of the Survivor, in Truſt for the Heirs of their two Bodies; and in Default of ſuch Iſſue, for the Heirs of the Body of the Husband, Remainder to the Heirs of the Survivor of the Husband and Wife; Husband and Wife have Iſſue a Son, the Husband dies, after which the Son dies without Iſſue in the Life of the Mother, who adminiſtring to her Husband and Son, aſſigns this Term to the Defendant; decreed the Aſſignee well entitled, and that the Term ſhould not go to the Heir of the Husband, as Attendant on the Reverſion. *Page* 360

Limitation of Terms for Years, Money, &c.

A. deviſes Houſhold Goods to his Wife for Life, and afterwards to his Son; the Court held this a good Deviſe over, and to be the ſame as if it had been only of the Uſe of the Goods to the Wife for Life. 1

Truſt of a Term is limited to *A.* for Life, then to his firſt, *&c.*

&c. Son in Tail Male, and for want of Iſſue Male, to his Daughter or Daughters for the Remainder of the Term; there having never been a Son, the Limitation to the Daughter was held good. *Page* 98

A. on his Marriage aſſigns a Term of 1000 Years in Truſt for himſelf for Life, Remainder to his Wife for Life, Remainder to the Heirs of the Body of the Husband and Wife, *&c.* the Wife dies leaving Iſſue; the whole Term veſts in the Husband, and he may aſſign it. 132

A Legacy given upon a Man's dying without Iſſue, to be paid within ſix Months after, the Man dies leaving Iſſue, which Iſſue within ſix Months after dies without Iſſue; the Legacy not due, it not being intended to ariſe upon any remoter Contingency than that of the Man's dying without Iſſue living at his Death. 198

Termor deviſes his Term to *A.* for Life, Remainder to ſuch of his Iſſue as *A.* ſhould appoint, and if *A.* die without Iſſue, Remainder to *B.* this held a good Deviſe to *B.* being to be underſtood if *A.* die without Iſſue living at his Death. 432

One having two Nephews *A.* and *B.* deviſes his perſonal Eſtate to *A.* and *B.* and if either of them die without Children, then to the Survivor; this is good, being to be intended without Children living at his Death. 534

One deviſes his perſonal Eſtate to his Son, and if his Son die within Age, and without Iſſue, then to go to the Teſtator's Brother; the Son ſhall have the Produce of the perſonal Eſtate, and only the Capital, in caſe of the Infant's Death, *&c.* ſhall go to the Brother. *Page* 500

One poſſeſſed of a perſonal Eſtate deviſes, that if his Wife die without Iſſue by him, then 80 *l.* ſhall be paid to his Brother; this good, even though the Brother dies in the Life of the Wife. 563

Deviſe of a Truſt of Money on Failure of Iſſue generally, or a Bond or Covenant to pay Money on ſuch Failure, good: *ſecus* of a Limitation of a Term. 566, 750

One poſſeſſed of a Term for Years deviſes it to *A.* and *B.* and if either of them die and leave no Heir of their reſpective Bodies, then to *C.* this held a good Limitation to *C.* if *A.* or *B.* left no Iſſue at their Death. 664

A Deviſe of a Term for Years to one for a Day, or an Hour, is a Deviſe of the whole Term, if the Limitation over is void, and it appears at the ſame Time that the whole is intended to be diſpoſed of from the Executor. 665, 666

Deviſe of 400 *l.* to *A.* and if he die without Iſſue, then to *B.* this good, and to be intended if *A.* die without Iſſue living at his Death. 748

Evidence and parol Evidence.

Parol Proof, provided it be plain and indiſputable, admitted in Caſe of a Will of a perſonal Eſtate, eſpecially where it is only to rebut an Equity ariſing by Implication. *Page* 9, 116

Parol Evidence, when concurring with the Conveyance, and only to rebut a pretended reſulting Truſt, admitted to ſhew the Intention of the Party. 113

Under ſome Circumſtances the Plaintiff himſelf has been allowed a good Witneſs; as where a Witneſs at the Time of his Examination was diſintereſted, but afterwards became intereſted and Plaintiff in the Cauſe, his Depoſitions were, notwithſtanding, allowed to be read. 288

So where the ſurviving Witneſs to a Bond was made Executor to the Obligee; in an Action brought by him on the Bond, Evidence was admitted to prove the Plaintiff's Hand. 289

In what ſpecial Caſes the Anſwer of one Defendant may be read againſt another. 300

A. a Freeman of *London*, purchaſes an Eſtate in the Name of *B.* but no Truſt is declared, *A.* dies, and *B.* gives a Declaration of Truſt; this is good. 321

A Witneſs dies after having been examined, but before ſuch Examination is ſigned by him; the Depoſitions no Evidence. 414

But yet where the Defendant after Publication examined a Witneſs, and on the uſual Affidavit, that the Defendant, his Clerk or Solicitor had not ſeen the Depoſitions, got an Order to re-examine this Witneſs, but the Witneſs died before a Re-examination, the Court gave Leave to the Defendant to make uſe of the former Depoſitions of the ſame Witneſs. *Page* 415

In a Will of Land, one of the three Witneſſes is Deviſee of Part of the Land deviſed thereby; *Quære*, whether not a good Witneſs if he has aliened the Land without Covenant or Warranty. 557

See more Tit. **Witneſs.**

Eſcape.

A. lends Money to *B.* and *C.* on Bond, *B.* becoming a Bankrupt, and his Eſtate being aſſigned by the Commiſſioners, *A.* ſues *C.* takes him in Execution on a *Ca' Sa'*, and afterwards conſents to his Eſcape; yet *A.* ſhall come in as a Creditor of the Bankrupt for a Moiety of his remaining Debt. 237

One committed in Equity, for a Contempt for reſcuing another taken on *Lord Chancellor*'s Warrant, ſuch Perſon not liable to an Eſcape Warrant. 439

Where one is taken in Execution on an Outlawry after Judgment, Debt will lie againſt the Sheriff for the Eſcape of ſuch Perſon, and need not be brought in the *Tam quam.* *Page* 687

Examination. Vide Tit. **Depoſitions.**

The Reaſon of examining a Witneſs *de bene eſſe*, and whether a Proſecution for Perjury will lie on ſuch Depoſition. 568

After Publication, and Examinations known, the Court will not give either Side Leave to examine. 727

Excommunication.

Want of Addition in the Libel on which there is an Excommunication, where the Proceedings are not by way of Proclamation with Pains and Penalties, no Objection. 435

It muſt be ſhewn where the Defendant was commorant, but ſufficient if this be ſet forth in the Libel; alſo the *Lord Chancellor* inclined to think, that after the Writ has been iſſued out of Chancery, brought into *B. R.* and there delivered to the Sheriff, but not yet actually returned into *B. R.* this Court, on a plain Error appearing, may ſuperſede or quaſh it. 436

Execution.

A Creditor, by Statute, of *J. S.* if *J. S.* become a Bankrupt and the Statute be not ſued and executed before the Bankruptcy, ſhall come in only *pro rata*, though there were Lands in Fee bound by the Statute. *Page* 92

Suing out an Execution againſt the Bail, pending a Writ of Error in Parliament, is a Contempt and Breach of Privilege. 685

Execution of a Power. Vide **Power**, alſo Tit. **Deeds**, and *the Conſtruction and Operation of them.*

Executor and Adminiſtrator.

In what Priority Debts are to be paid by an Executor or Adminiſtrator, vide alſo under Tit. **Aſſets.**

Where a Legacy is given to a Man, his Executors, Adminiſtrators and Aſſigns, if the Legatee dies in the Life of the Teſtator, his Executors, *&c.* ſhall not have the Legacy. 84

If two Executors join in a Receipt for Money, and only one of them actually receives it, both are chargeable to Creditors, but not to Legatees. 241

An Executor, in Equity, as well as at Law, may prefer any Creditor in equal Degree, or, after an Action brought by one Creditor, may confeſs Judgment to another. 295

An Executor cannot bring a Bill without ſhewing thereby that he has proved the Will; but it is ſufficient to ſhew that he has duly proved the Will, without ſpecifying in what Court. 752, 766

So

So if an Executor brings a *Scire facias* to revive a Decree, he muſt ſhew he has proved the Will, and if there be *bona notabilia* in divers Dioceſes, if he ſhew Proof of the Will in the Spiritual Court of one of the Ordinaries, this is not good, but in ſuch Caſe the Proof muſt be in the Archbiſhop's Court. *Page* 766

See more of *Executor* under Heir, and *Matters controverted between the Heir and Executor*.

In what Caſes an Executor ſhall be only a Truſtee.

Where an Executor has an expreſs Legacy, the Court of Chancery looks upon him as a Truſtee with regard to the undiſpoſed Surplus, and will make him account for it to the next of Kin, although the Spiritual Court has no ſuch Power. 7

Though in all ſuch Caſes parol Proof may be admitted to ſhew that the Teſtator intended to give his Surplus to his Executors, this being only to rebut an Equity ariſing by Implication in Favour of the next of Kin. 9, 115

Where, on a Bill brought by the next of Kin for a Diſtribution, the Executor in his Anſwer waived the Benefit of the Surplus, by Miſtake of the Law in that Point, he being able to prove the Teſtator's Intentions to give him the Surplus, yet he was denied to amend his Anſwer. *Page* 297

One deviſed Lands to his Executors (who were no Relations to him) and the Survivor of them, to ſell for the beſt Price, and to pay his Debts, Legacies and Funerals, ſo far as the ſame would extend, giving Legacies to his Heirs at Law, and 100 *l.* to the Children of one of the Executors, but nothing to the Executors themſelves; in ſuch Caſe the Executors were looked upon as Truſtees for the Heir at Law, after Debts paid. 390

An Executor has an expreſs Legacy, and ſo have the next of Kin, but no Diſpoſition of the Surplus; the latter decreed to have it. 544

In which Caſe ſee alſo ſeveral Inſtances where an Executor, though a Wife, has been decreed to diſtribute.

If I make *A.* my Executor, and ſay no more, and *A.* dies Inteſtate, without diſpoſing in his Life-time of ſuch perſonal Eſtate, my next of Kin, and not his, ſhall have Adminiſtration *de bonis non*, together with all my perſonal Eſtate; *ſecus* where I make *A.* my Executor, and give him all my perſonal Eſtate. 553

How to account.

Two Executors join in a Receipt for Money which is actually received by one of them only, both liable to Creditors,

Creditors, but not to Legatees; but where two Truſtees join in a Receipt, the Money being paid to one, only the receiving Truſtee ſhall be charged. *Page* 83, 241

Where an Executor puts out Money without the Indempnity of a Decree, upon a real Security, which at that Time there was no Reaſon to object to, but afterwards ſuch Security proves bad; he is not accountable for the Loſs, any more than he would have been entitled to the Profit, had it continued good. 141

An Executor pays the Aſſets of his Teſtator into the Hands of a Banker his Co-executor, whom the Teſtator uſed to intruſt with his Money, after which the Banker fail'd; the Executor not chargeable with this Loſs. 243

A Mortgage comes to an Executor, who receives the Money and pays it away to his Teſtator's Creditors, afterwards it appears that the Mortgage has been ſatisfied in the Teſtator's Life-time; the Executor muſt refund, though he had before paid the Money away in Debts which he had not otherwiſe Aſſets to pay. 355

So if an Executor recovers a Debt, and pays the Teſtator's Debts with it, after which the Judgment recovered by him is reverſed in Error; he muſt reſtore the Money to the Plaintiff in Error, and his having paid it away in Debts will not excuſe him. 357

Expoſition of Words. See alſo **Will.**

Articles conſtrued againſt the Words for the Sake of the Intent; as where the Wife's Portion was to be laid out in Land to be ſettled on Husband and Wife and the Heirs of their Bodies, and if not laid out in Land during their joint Lives, and the Wife ſhould die firſt, that the Money ſhould go to her Brother and Siſter; the Wife dies firſt, leaving Iſſue, and the Money is not laid out in a Purchaſe; yet the Iſſue, and not the Wife's Brother and Siſter, ſhall have it, Equity ſupplying the Words, *if the Wife die without Iſſue.* *Page* 234

Where there is a Power to charge Lands with younger Childrens Portions living at the Father's Death, a Poſthumous Child is within the Power. 245

By the Deviſe of all one's Goods a Bond will paſs. 267

One being on Ship-board and entitled to Part of a conſiderable Leaſehold Eſtate by the Death of his Mother, which he did not know of, makes his Will at Sea, deviſing to his Mother (if living) his Rings, and makes *A.* his Executor, to whom he deviſes his Red Box, *and all Things not before bequeathed*; theſe general Words ſhall not paſs what the Teſtator did not know he had a Right to, but ſhall be reſtrained to Things *ejuſdem generis.* *Page* 302

One deviſes the Surplus of his perſonal Eſtate to his Relations; only ſuch ſhall take as would be entitled within the Statute of Diſtribution. 327

A Deviſe to one's poor Relations, how conſtrued. *ibid.*

Sed Quære.

If one deviſes the Surplus of his Eſtate to his Children and Grandchildren living at his Death, a Grandchild *in Ventre ſa mere* at the Teſtator's Death ſhall take; *ſecus* had the Deviſe been to his Children and Grandchildren. 342

A Bequeſt of Houſhold Goods extends to all Houſhold Goods purchaſed after the making of the Will, and that are in the Houſe at the Teſtator's Death, as alſo to Plate in common Uſe in a Family. 424, 575, 598

Where a Will was wrote blindly and hardly legible, and the Legacies in Figures, the Court referred it to a Maſter to examine what thoſe Legacies were, and the Maſter to be aſſiſted by ſuch as underſtood the Art of Writing; alſo where the Legatee's Name was very falſly ſpelt, referred to a Maſter to ſee who was intended. 425

A Proviſion for Daughters *to be* born extended to Daughters *then* born. 426

One by Will gives 5 *l. per Annum* to all and every the Hoſpitals, and it was proved the Teſtator lived in a Place where there were Hoſpitals; it was taken to be thoſe Hoſpitals, and not to extend to another Hoſpital about a Mile from thence, though founded by the ſame Perſon. *Page* 426

Hoſpitals and Spittals the ſame. *ibid.*

A Deviſe was of a Truſt to all the Teſtator's Daughters *or* their Children living at the Teſtator's Son's Death; ſome of the Daughters were living at the Son's Death, and had Children, and other of the Daughters were dead, leaving Children; decreed that all the Children, as well of the living as of the dead Daughters, ſhould take, the Word *or* being to be taken for *and* 434

A. deviſes his Library of Books *now* in the Cuſtody of *B.* and afterwards buys more Books, which he places in the ſame Library; the after-bought Books ſhall paſs. 597

By a Deviſe of an Houſe *cum pertinentiis*, only the Garden and Orchard will paſs with it; but by the Deviſe of an Houſe with the Lands appertaining thereto, the Lands occupied therewith ſhall paſs. 603

Two Schools in one Town, one a Free, the other a Charity School for Boys and Girls; *A.* deviſes 500 *l.* to the Charity School; though both be Charity Schools, yet only that for Boys and Girls ſhall take. 674

Vide **Charity**.

Father and Son.

FATHER buys an Eſtate in the Name of his younger Son and of a Truſtee; this ſhall be taken as an Advancement; ſo though a Reverſion be ſettled on the younger Son expectant on his Mother's Death. *Page* 111

A Parent makes a Purchaſe in his Child's Name, and takes the Profits during the Infancy of ſuch Child; this will be conſtrued to have been done as Guardian only; *ſecus* where the Parent continues to take the Profits after the Child's coming of Age; for this may be conſtrued a Truſt for the Parent. 111, 608

The Father covenants to ſettle an Eſtate on the Marriage of his Son, who privately agrees to repay ſo much out of it to the Father; the Son being in ſuch Caſe under the Awe of his Parent, and not ſuppoſed to act freely, Equity will relieve againſt ſuch private Agreement. 121

A Son in plentiful Circumſtances gives his Father a Bond to pay him 120*l.* Annuity for his Life; if done freely, and without Coertion, good; and what Words or Circumſtances will not be conſtrued a Coertion. 607

If a Father in low Circumſtances endeavours to marry his own Child to one who has an Eſtate not any ways proportionable, the Court of Chancery will interpoſe. *Page* 705

Fee-Farm Rent. See Tit. **Diſtreſs**, and **Rent.** *Fee-ſimple and Fee-tail.* See **Eſtates.**

Fine.

A Fine cannot be levied of Money agreed to be laid out in Land and ſettled in Tail; but a Decree can bind ſuch Money equally as a Fine could the Land. 130

Though a Fine levied by Leſſee for Years, or at Will, be void, yet it is otherwiſe where levied by one having a defeaſible Right, and ſuch Leſſee joins with them. 520

Forfeiture.

Father gives his Son 40*l.* upon Condition that he does not diſturb his Truſtees; on the Truſtees applying for an Execution of the Truſt, the Son decreed either to join in a Sale of the Premiſſes, or elſe to forfeit his 40*l.* Legacy. 136

How far Equity will aſſiſt one to take Advantage of a Forfeiture. 353

Foreign Laws.

Foreign Laws and Cuſtoms, as of *France*, *Holland*, &c. muſt be proved, elſe the Court

Court cannot take Notice of them. *Page* 431

Foreign Plea.

No Foreign Plea to be admitted after a general Imparlance. 477

Fraud.

Colluſion, *Covin*, *Concealment*, *Impoſition*, vide alſo under Tit. **Deeds**; *Under-hand Agreement* under Tit. **Agreement**; vide *Catching Bargains* under Tit. **Heir.**

Deviſee under a Will defectively executed, repreſents the Will duly executed, and for a ſmall Sum gains a Releaſe from the Heir; Releaſe ſet aſide. 239

Where there is either *ſuppreſſio veri* or *ſuggeſtio falſi*, it is good Reaſon to ſet aſide any Grant or Releaſe. *ibid.*

A Will of Land may be good at Law, as being well executed, and yet ſet aſide in Equity, as if obtained by Fraud. 288

Where an Executor proves a Will of a perſonal Eſtate wherein one of the Legacies is forged, the Executor has no Remedy in Equity for this Fraud, but ought to have proved the Will, with a ſpecial Reſervation as to that Legacy. 388

Where the firſt Mortgagee is a Witneſs to the ſecond Mortgage, tho' no actual Proof of his having known the Contents thereof, yet ſince it will be preſumed that he might have known the ſame, this ſhall poſtpone him. *Page* 394

One makes a voluntary Settlement on her Nephew, keeping the Deed in her Cuſtody, and in the ſaid Settlement there is no Power of Revocation; afterwards the Father of the Nephew by Stealth gets an atteſted Copy of the Settlement, and then the Aunt having burnt the Deed, ſettles the Premiſſes on another Nephew; the firſt Nephew's Bill to eſtabliſh the Copy of the firſt Settlement, diſmiſſed with Coſts, and on the ſecond Nephew's Bill the atteſted Copy decreed to be delivered up, as having been indirectly gained. 577

Of two voluntary Settlements, if the firſt be made abſolute againſt the Intention of the Party, the ſecond ſhall prevail. 581

On a Bill to ſet aſide a Decree againſt an Infant for Fraud, if ſuch Decree be not fraudulent, tho' in every Reſpect not ſo equitable, Court will do nothing in it. 734

Equity will aſſiſt a Compoſition, of a Debt, if obtained without Fraud, and on a fair Repreſentation. 751

Frauds and Perjuries. See **Agreement.**

Freehold.

Things fixed thereto. See alſo *Matters controverted between the Heir and Executor* under Tit. **Heir.**

Hangings, Chimney-Glaſſes or Pier-Glaſſes are Matters of Ornament and Furniture, and not to go with the Houſe. *Page* 94

One deviſes Lands to his Executors for and until Payment of his Debts, and then to *A.* for Life, *&c.* this but a Chattel Intereſt in the Executors, and the Freehold well veſts in *A.* 509

Gavelkind.

ALL Lands in *England* before the Conqueſt were in Nature of Gavelkind, and after the Introduction of Tenures by Knights-Service, yet has the Right of Repreſentation continued. 64

As if one of the Sons dies in the Life of the Father, leaving a Daughter, and afterwards the Father dies, the Daughter ſhall have her Father's Share. 65

All Lands in *Kent* are preſumed to be Gavelkind. 475

Grant.

How, and in what Reſpects a Deviſe of a Chattel Intereſt differs from a Grant thereof. *Page* 575

Guardian.

An Executor pays a Legacy given to a Child, to the Father as Guardian; this ill, notwithſtanding the Teſtator by Parol on his Death-Bed had directed it. 285

Guardians appointed by Will, according to 12 *Car.* 2. *cap.* 24. have no more Power than Guardians in Socage, and are but Truſtees, on whoſe Miſbehaviour, or giving Occaſion for Suſpicion, the Court of Chancery will interpoſe. 703

If a Father in low Circumſtances endeavours to marry his own Child to one who has an Eſtate not any ways proportionable, the Court of Chancery will interpoſe. 705

A Will recommends it to Guardians to act with the Advice of *J. S.* who is afterwards attainted; this Superintendency devolves upon the Great Seal. 706

Heir.

Heir and Anceſtor. See alſo **Aſſets.**

HEIR not always, and of Neceſſity to be intended a Word of Limitation. *Page* 59

So where the Deviſe was to the Heirs Male of *J. S.* begotten; *J. S.* having a Son, and the Teſtator taking Notice that *J. S.* was then living; this is a ſufficient Deſcription of the Teſtator's Meaning, and the Son allowed to take, tho' ſtrictly ſpeaking he was not Heir. 229

A voluntary Conveyance made to the Brother of the Half Blood, but which was defective at Law, made good by a Court of Equity againſt the Heir. 60

Though where there is not that Conſideration of Blood, a voluntary Conveyance of a Copyhold, or other Eſtate, will not be helped in Equity againſt the Heir. 354

One ſeiſed of Lands in Fee binds himſelf and his Heirs in a Bond, and having deviſed his Lands to *J. S.* in Fee, dies; in a Bill brought by the Obligee to ſubject the Lands deviſed, the Deviſor's Heir muſt be made a Party. 99

In a Deviſe to a Man and his Heirs, the Word *Heirs* is uſed only to Meaſure out the Quantity of Eſtate which the Deviſee is to take, and not as a Word of Purchaſe; for which Reaſon if the Deviſee dies in the Life of the Deviſor, his Heirs ſhall not take. *Page* 397

An Heir at Law, or Heir Male to the Honour of the Family, if probable Cauſe to contend for the Family Eſtate, ſhall not pay Coſts. 481

One ſeiſed in Fee mortgages to *A.* and afterwards binds himſelf and his Heirs by Bond to *A.* and dies; if the Heir comes to redeem, he muſt pay the Bond-Debt as well as the Mortgage; but if the Heir aſſigns the Equity of Redemption to *J. S.* he ſhall redeem upon Payment of the Mortgage only. 775

Deviſe to *A.* for Life, Remainder to the right Heirs of *J. S.* (then living;) the Fee-ſimple deſcends to the Heir at Law of the Teſtator until the Contingency happens. 516

An Heir, in an Action brought againſt him by a Bond-Creditor, is ſued as for his own Debt in the *Debet* and *Detinet*; and before the Statute of 4 & 5 *W. & M. cap.* 14. on his having aliened before Action brought, was reſponſible in Equity for the Value of the Land aliened. 777

Matters controverted between the Heir and Executor.

Hangings, Chimney-Glaſſes or Pier-Glaſſes, as Matters of Ornament and Furniture, go to the Executors, and not with the Houſe. *Page* 94

Where Money put out on Securities was by Marriage Articles aſſigned in Truſt to be inveſted in Land and ſettled on the Husband for Life, Remainder to the Wife for Life, Remainder to the firſt and every other Son in Tail Male, Remainder to the Daughters in Tail, Remainder to the right Heirs of the Husband; and the Husband, having altered ſome of theſe Securities, and put them out in Truſt for himſelf, his Executors and Adminiſtrators, deviſed his real Eſtate in the County and City of *York* and elſewhere in *Great Britain*, to *J. S.* but gave his perſonal Eſtate and all his Securities for Monies to his Wife, whom he made Executrix, and afterwards died without Iſſue; decreed that as to the Money on ſuch Securities as had not been altered by the Husband, this was by the Articles turned into Land, and ſhould deſcend to the Heir; but that with reſpect to the Securities which were altered by the Husband, and the Money placed out in Truſt for himſelf, *&c.* theſe ſhould paſs to the Wife as perſonal Eſtate. *Page* 172

Leſſor dies on *Michaelmas-day* and before Sun-ſet, the Heir or Jointreſs, not the Executor, ſhall have the Rent. *Page* 177

But if the Tenant had paid the Rent on the Day, the Payment had been good, tho' the Leſſor had died before Sun-ſet, but his Executors to Account for this Rent to the Jointreſs. 180
Quære tamen.

One ſettles Lands, on his Marriage, on himſelf and Wife, and Iſſue of the Marriage, and conveys Bankers Aſſignments which are but perſonal Eſtate in Truſt, declaring the Profit thereof to go to the ſame Perſon as by the Settlement would be entitled to the Land, and if the Annuity ſhall be redeemed by Parliament, the Money to be inveſted in Land and to be ſettled to the ſame Uſes; theſe Annuities and Bankers Aſſignments, after the Wife's Death, ſhall go to the Heir, and not to the Executor. 205

An Incumbent of a Church purchaſes the Inheritance of the Advowſon and dies; his Heir, and not his Executor, ſhall preſent. 364

Where Money is covenanted to be laid out in a Purchaſe of Land to be ſettled on *A.* in Fee; on *A.*'s dying before the Money is laid out, his Heir, and not his Executor, ſhall have it. 483

But if *A.* himſelf has received any Part of the Money, this is a good Payment, and ſhall not be repaid by the Executor to his Heir. *Page* 483
So on *A.*'s Death, his Heir ſhall recover the Remainder of the Money not received by him. *ibid.*
In like Manner, if *A.*'s Heir is an Infant, and the Remainder of the Money is decreed to be brought into Court, it ſhall be looked upon as Land. 486
J. S. Leſſee of Land to him and his Heirs for three Lives, aſſigns over the whole Eſtate, reſerving a Rent to himſelf, his Executors, and dies; his Executor, and not his Heir, ſhall be entitled to the Rent. 555
See more under **Rent**, and *Perſonal Eſtate.*

Heir, catching Bargains.

Deviſee under a Will defectively executed repreſents the Will as duly executed, and for a ſmall Sum gains a Releaſe from the Heir; the Releaſe ſet aſide. 239
A Son, who after his Father's Death is a Remainder-man in Tail, ſells his Remainder at an under Rate; the Court ſet aſide the Conveyance. 310

Hotchpot. Vide **London.**

Hundred.

In an Action againſt the Hundred for a Robbery, where the Suit muſt be commenced within a limited Time, or if the Time be ſo far elapſed, as that the Statute of Limitations would be a Bar, were the Judgment to be reverſed, the Court, after a Writ of Error brought to reverſe the Judgment for want of an Original, will give the Party Leave to file one; *ſecus* where the Plaintiff may begin a new Action. *Page* 412
Inſtructions for an Original againſt an Hundred for a Robbery were brought to the Curſitor within the Year, but the Writ paſſed the Great Seal after the Year, though teſted within the Year, (*viz.*) when the Inſtructions were brought; this held good, being warranted by the Practice of the Curſitor's Office. 437

Jew.

IN the Courts allowing Maintenance out of a Jew's Eſtate to his Daughter turned Proteſtant by Virtue of 1 *Annæ*, *cap.* 30. it is no Objection, that the Daughter is above forty Years of Age, or married, or that the Jew is dead. 524

Implication.

Eſtate by Implication.

No Eſtate raiſed by Implication in a Will ſhall deſtroy an expreſs Eſtate; as where a Deviſe was to *A.* for Life, Remainder to his firſt and every other Son in Tail Male, and for want of Iſſue Male of *A.* Remainder over; this gave no Eſtate-tail to *A.* by Implication. *Page* 54, 333

Quære autem. 605

Secus where the Limitation is not carried over to all the Sons, ſince if the Father were not to have an Eſtate-tail, ſuch Son as is not mentioned in the Limitation would be excluded. 59

Et vide. 754

Where a Perſon is entruſted to convey a Fee, he muſt conſequently and by neceſſary Implication be ſuppoſed to have a Fee. 171

Deviſe of Land to the Teſtator's ſecond Son for his Life, he or his Heirs paying a Rent thereout to the eldeſt Son for his Life, and after the Death of the ſecond Son *and his Wife*, Remainder to the firſt, *&c.* Son of the ſecond Son; the Wife of the ſecond Son had an Eſtate for Life by Implication. 472

Incumbrances. Vide **Securities.**

Infant.

One deviſes 1000 *l.* to be laid out in a Purchaſe of Land in Fee for the Benefit of *A. B.* and *C.* and their Heirs, equally to be divided; *A.* dies leaving an Infant Heir; *B.* and *C.* may elect to have their Share of the Money paid them, but the Infant cannot. *Page* 389

Where a Decree *niſi Cauſa* is had againſt an Infant, on the Infant's coming of Age, and before the Decree made abſolute, he may put in a new Anſwer. 504

One borrows Money during his Infancy, applying it to the buying of Neceſſaries, and afterwards coming to Age deviſes his Lands for the Payment of his Debts; theſe Debts contracted during Infancy are within the Truſt. 558

Infant borrows Money and applies it towards Payment of his Debts for Neceſſaries; he is liable to pay this in Equity, though not at Law. 559

No Laches to be imputed to an Infant. 718

On a Bill brought to ſet aſide a Decree againſt an Infant for Fraud, if the ſame be not fraudulent, though in every Reſpect not ſo equitable, the Court will not ſet it aſide. 734

Infant aggrieved by a Decree, not bound to ſtay till he is of Age, but may as ſoon as he thinks fit bring a Bill of Review, re-hear, or bring an original Bill, and alledge ſpecially the Errors in the former Decree. *Page* 737

Injunction.

An Injunction upon an Attachment, *Dedimus*, or upon the Defendant's praying Time to anſwer, does not extend to ſtay Proceedings in the Spiritual Court without ſpecial Order. 301

Leſſee for Years without Waſte, Remainder in Fee to a Biſhop; Leſſee injoined from digging the Ground for Brick. 527

See **Waſte.**

In caſe of a Truſt-Eſtate deviſed to be ſold, or deviſed to *J. S.* if the Will be diſputed after two Trials in its Favour; Equity will grant a perpetual Injunction. 671

So after ſeveral Trials in Ejectment, and Verdicts in all in Favour of the Will, Equity, on a Bill of Peace, will grant a perpetual Injunction. 672

A perpetual Injunction will the rather be granted, where this Court directs the Trial, or where the Cauſe, againſt which the Verdicts are found, is odious in its Nature. 673

One of the late Directors of the *South-Sea* Company owes Money, which is recovered againſt him at Law; though all his Eſtate is taken from him by the late Act, yet the Court denied an Injunction. *Page* 695

Inrolment.

Where the Court permits the Inrolling of a Recognizance after the Time elapſed, it always takes Care not to hurt an intervening Purchaſer. 340

If after a Decree, a *Caveat* be entered to ſtay the Signing and Inrolling, it ſtays the Signing twenty-eight Days after the preſenting the Decree to the Chancellor to be inrolled, and Notice given by the Chancellor's Secretary to the Clerk on the other Side. 609

Intereſt of Money.

When a Truſt is raiſed to pay Debts, Simple Contract Debts ſhall carry Intereſt. 229

Intereſt allowed but from the Time of the Maſter's Report confirmed, where the Debt is not before liquidated. 377

Intereſt allowed for a Ship and Cargo wrongfully taken by the Defendant; and this being done in the *Indies*, *Indian* Intereſt allowed, deducting the Charge of the Return. 395

Where the Maſter's Report of the *Quantum* of Intereſt due on a Mortgage is confirmed, the Intereſt from that Time becomes Principal, and will carry Intereſt. *Page* 453, 480, 653

One deviſes his perſonal Eſtate to his Son, and if he die under Age, and without Iſſue, then that it ſhall go over to the Teſtator's Brother; the Son ſhall have the Produce or Intereſt thereof, and only the Capital (in Caſe of his Death under Age, and without Iſſue) ſhall go to the Brother. 500

An Annuity left the Widow by the Husband's Will decreed to carry Intereſt from the Day on which it was payable, and not only from the ſubſequent Day of Payment after the Arrear incurred 543

Mortgagor reſerving ſix *per Cent.* with a Proviſo to take five if paid within three Months; on a great Arrear incurred, the Court will not relieve; *ſecus* in Caſe of a ſmall Slip of Time. 652

Where a Mortgagor ſigns an Account, whereby ſo much is admitted to be due for Intereſt; this will not carry Intereſt, unleſs the Mortgagor by ſome Letter or Writing under his Hand agrees to make it Principal. 653

By a Marriage Settlement and Will 15000 *l.* was ſecured for a Daughter's Portion, payable at eighteen or Marriage, the Whole charged upon an Eſtate in *Ireland*; but the Settlement and Will were made, and alſo all the Parties lived in *England*; the Money decreed to be paid with *Engliſh* Intereſt, and without deducting the Charge of the Return from *Ireland*. *Page* 696

Where and from what Time Legacies and Portions ſhall carry Intereſt, vide Tit. *Legacies and Portions.*

Jointenants and Tenants in Common.

A Surrender of a Copyhold to the Uſe of *A. B.* and *C.* and their Heirs, equally to be divided between them and their Heirs reſpectively; this held by two Judges in *B. R.* to be a Tenancy in Common, by reaſon of the apparent Intention of the Surrenderor, contrary to the Opinion of *Holt* C. J. who thought it a Jointenancy. 14

The Words *equally to be divided* did not originally make a Tenancy in Common even in a Will. 21

A. by Will deviſes Lands in Truſt, that the Profits ſhall be equally divided between his Wife and Daughter (the Heir of the Teſtator) during the Wife's Life; by the Opinion of all the Judges of *C. B.* the Mother and Daughter are Tenants in Common for

for the Wife's Life. *Page* 34

Deviſe of a Debt to two Share and Share alike, equally to be divided between them; and if either of them dies, then to the Survivors and Survivor of them; they are Tenants in Common, and not Jointenants; the Words relating to the Survivorſhip being intended only to carry over the Share of him that might die in the Life of the Teſtator, and preſerve the Lapſing thereof. *Quære tamen.* 96

A Deviſe of a Surplus of a perſonal Eſtate to four equally, Share and Share alike; one of the four dies in the Life of the Teſtator; this being a Deviſe in common, the Share of the Perſon dying is become a lapſed Legacy, and diſtributable according to the Statute. 700

Ireland.

A Daughter's Portion ſecured by an Eſtate in *Ireland* by a Settlement made in *England*, and the Parties living in *England*, ſhall be paid in *England* without the Charge of the Return. 696

Judgment. Vide Tit. **Securities.**

Juriſdiction. Vide Tit. **Court** and *Court of Chancery*, and Tit. **Spiritual Court.**

Where one is ſued in an inferior Court for a Matter out of the Juriſdiction, if in Vacation-Time, a Prohibition lies from the Court of Chancery, on Affidavit that the Matter is out of the Juriſdiction; but no Affidavit is neceſſary where on the Face of the Declaration the Matter appears to be out of the Juriſdiction. *Page* 476

By Imparling generally the Juriſdiction is admitted, and no foreign Plea will be received afterwards. 477

King. See **Prerogative.**

Laches.

TRuſtees not to take Advantage of their own Laches. 236

No Laches to be imputed to a Feme Covert or Infant. 718

Leaſes, and *Covenants therein.* See *Eſtate for Life*, and *Eſtate for Years*, under Tit. **Eſtates.**

Leſſee for Years, though *ſans* Waſte, can pull down an Houſe

Houſe, or Trees which are a Defence or Ornament to the Houſe. *Page* 528

Hard that Leſſee for Years without Waſte ſhould enjoy the Trees or Materials of the Houſe when he pulls them down; the Intention of that Clauſe only being that the Leſſee for Years ſhould be as diſpuniſhable as before the Statute of *Glouceſter*. *ibid.*

A College reſtrained by its Conſtitution from Leaſing, except for Twenty-one Years, and at a Rack-Rent, makes Orders, recommending it to their Succeſſors to renew at leſs than their Rack-Rent; this not favoured, as tending to a Breach of the Statutes. 655

Legacy and Legatees. Vide alſo Tit. **Satisfaction**; alſo *Legacies given on Condition to marry with Conſent*, &c. See *Reſtraints on Marriage*, under Tit. **Marriage**.

A Child of a Reſiduary Legatee no Witneſs to prove a Will of a perſonal Eſtate. 10

Where a Legacy is given to a Man, his Executors and Adminiſtrators, and the Legatee dies in the Life-time of the Teſtator, the Executor ſhall not have it; but a Will that deſigns to prevent the Lapſing of a Legacy by the Death of the Legatee, ought to be ſpecially penned. 86

Father gives his Son 40 *l.* on Condition that he does not diſturb his Truſtees; on the Truſtees applying for an Execution of the Truſt, the Son decreed to join in the Execution thereof, or elſe to forfeit his Legacy. *Page* 136

Legacy given upon a Man's dying without Iſſue, to be paid within ſix Months; the Man dies leaving Iſſue, which Iſſue within ſix Months after died without Iſſue; the Legacy not due, it not being intended to ariſe upon any remoter Contingency than that of the Man's dying without Iſſue living at his Death. 198

Though the Court (generally ſpeaking) marſhals Aſſets in Favour of a Legatee, as well as of a Simple Contract Creditor, yet a pecuniary Legatee ſhall not be allowed to come in upon the Land, in the Place of a Bond-Creditor, againſt the Deviſe of ſuch Land. 204, 679, 730

Payment to the Father by an Executor of a Legacy given to a Child, held ill, though the Teſtator by Parol on his Death-Bed had directed it. 285

A Reſiduary Legatee, where there was a Deficiency of Aſſets, on the particular Circumſtances of the Caſe, permitted to come in *pari paſſu* with the other Legatees. 305

Deviſe to Truſtees and Executors, as an Incouragement to accept of the Truſt, of 100 *l.* a-piece, 12 *l.* for Mourning, and

and a Ring, and 10 *l. per Ann.* a-piece for their Trouble; one refuſes, yet he ſhall have his Mourning and Ring, but not the 100 *l.* Legacy, nor the 10 *l. per Annum*; both which in ſuch Caſe ſhall not go to the acting Executors, but ſink in the Eſtate. *Page* 334

Pecuniary Legacies are given by the Will, and afterwards greater Legacies given to the ſame Perſons by the Codicil; theſe no Satisfaction for the Legacies by the Will, but the Legatees to have both, becauſe the Codicil is Part of the Will; *a fortiori* if the Legacies by the Will and Codicil are of different Natures. 421, 423, 424

One gives Legacies by his Will, and other Legacies by his Codicil, charging his Land with the Legacies in the Will only; on the perſonal Eſtate's not being ſufficient to pay all the Legacies, the Land ſhall bear the Charge of the Legacies by the Will, and thoſe given by the Codicil be paid out of the perſonal Eſtate. 422

Where the real Eſtate was by Will charged with the Payment of the Legacies *abovementioned*, this was held not to extend to the Legacies in the Codicil; *ſecus* had the Land been charged with the Payment of Legacies generally. 423

A Legatee's Name very falſely ſpelt, referred to a Maſter to ſee who was intended. 425

Where the Will was wrote blindly, and hardly legible, and the Legacies in Figures, the Court referred it to a Maſter to examine what thoſe Legacies were, and he to be aſſiſted by ſuch as underſtood the Art of Writing. *Page* 425

One deviſes a Legacy out of a Fund which fails, whether, and in what Caſes the Legacy ſhall be paid out of the perſonal Eſtate. 778

Donatio Cauſâ mortis.

One by Will diſpoſes of his perſonal Eſtate, and afterwards by Parol gives 100 *l.* Bill to *A.* to deliver over to his Nephew, if the Teſtator ſhould die of that Sickneſs; ſuch Gift decreed good. 404

Husband upon his Death-Bed delivers to his Wife a Purſe of 100 Guineas, bidding her apply it to no other Uſe than her own; this is a good Legacy to the Wife. 441

Not neceſſary to prove a Gift which takes Effect as *Donatio Cauſâ mortis* (tho' in Nature of a Legacy) with the Will, it operating as a Declaration of Truſt on the Executor. *ibid.*

Husband on his Death-Bed draws a Bill on his Goldſmith to pay his Wife 100 *l.* for Mourning; this a good Appointment. 442, 443

Specific

Specific Legacies. See alſo *Abatement*, and *Refunding of Legacies.*

Money ordered by Will, or articled to be laid out in Land, or in an Annuity, to be looked upon in Equity as Land, or an Annuity, and as a Specific Legacy; conſequently on a Deficiency of Aſſets not to abate in Proportion with other Legacies. *Page* 127
Vide autem. 539
So a Legacy given to the Wife in Conſideration that ſhe releaſe her Dower on a Deficiency of Aſſets, ſhall not abate in Proportion. *ibid.*
Specific Legacy not to be broken into in order to make good a pecuniary one; much leſs ſhall pecuniary Legatees, on a Deficiency of Aſſets, have any Remedy for their Legacies againſt a Deviſee of Land; as where one ſeiſed in Fee owes Debts by Bond, and deviſes Land to his Heir in Tail, giving ſeveral Legacies, and the Heir who was alſo Executor, with the perſonal Eſtate paid off the Bond-Debts, by which Means there was a Deficiency of Aſſets to pay the Legacies; the Legatees were held to be without Remedy; otherwiſe had the Land deſcended to ſuch Heir in Fee. 201, 678
One ſeiſed in Fee of ſome Lands, and poſſeſſed by Leaſe for Years of other Lands, deviſes the Fee to *A.* and the Leaſe to *B.* and dies indebted by Bond; both theſe Deviſes being Specific, ſhall contribute equally to the Payment of the Bond-Debts. *Page* 403
Deviſe of a Rent-Charge out of a Term, as much a Specific Deviſe as of the Term itſelf. *ibid.*
Specific Legacies on a Deficiency of Aſſets are not to abate in Proportion. 422
A Legacy of 1500 *l.* to be laid out in Land, though to be taken as Land, yet is not Specific, but on a Deficiency of Aſſets ſhall abate in Proportion. 539
A Specific Legacy is what veſts by the Conſent of the Executor; and as in ſome Reſpects it has the Advantage, ſo in others it has the Diſadvantage of a pecuniary Legacy. 540

Legacies or Portions veſted, lapſed or extinguiſhed.

A. deviſes to *B.* 400 *l.* which he owed *A.* provided he thereout pays ſeveral particular Sums to his Children, the Reſt he freely gives him, directing his Executors to deliver up the Securities, and not to claim any Part of the Debt, but to give ſuch Releaſe as *B.* his Executors, &c. ſhall require; *B.* dies in the Life of the Teſtator; decreed

creed that ſo much of the 400 *l.* as was to remain to *B.* was a lapſed Legacy. *Page* 83

A Will, which deſigns to prevent the Lapſing of a Legacy by the Death of the Legatee in the Life of Teſtator, ought to be ſpecially penned. 86

One deviſes Portions to his Children, *A. B.* and *C.* and if any die before twenty-one or Marriage, the Portion of the Child ſo dying to go to the Survivors or Survivor; one of the Children dies in the Life of the Teſtator, this not a lapſed Legacy, but ſhall go to the ſurviving Children. 274

An Annuity is left by Will to the Teſtator's Grandaughter, but if ſhe marries with the Executor's Conſent, then a Portion; the Grandaughter without Conſent of the Executor marries a Man worth nothing; the Husband is not entitled to the Money, the having married with Conſent, *&c.* being a Condition precedent to the veſting of the Portion. 284

One poſſeſſed of a perſonal Eſtate deviſes, if his Wife dies without Iſſue by him, that then 80 *l.* ſhall be paid to his Brother, the Brother dies in the Life of the Wife, who afterwards dies without Iſſue; decreed the Legacy to be paid to the Repreſentatives of the Brother. 563

A. deviſes the Surplus of his perſonal Eſtate to four, equally Share and Share alike, leaving *J. S.* Executor in Truſt; one of the four dies in the Life of the Teſtator, his Share is lapſed, and on the Teſtator's Death ſhall go according to the Statute of Diſtribution. *Page* 700

A. amongſt other Legacies, leaves 1000 *l.* to his Niece *B.* at eighteen or Marriage, and gives the Reſidue of his perſonal Eſtate to be laid out in Land, and ſettled in ſtrict Settlement on *C.* for ninety-nine Years, Remainder to his firſt, *&c.* Son in Tail; afterwards *A.* by Codicil deviſes, that the 1000 *l.* given by the Will to his ſaid Niece ſhould be made up 6000 *l.* payable at twenty-one or Marriage, the Niece was eighteen at the Time of the Teſtator's making his Codicil and under twenty-one; decreed ſhe ſhould have the Intereſt of the 6000 *l.* from the Death of the Teſtator, and that *C.* was only entitled to the *Reſiduum*, excluſive of the 6000 *l.* 783

Abatement and refunding of Legacies. See alſo under *Specific Legacy.*

Charity Legacies that are pecuniary, ſhall, on a Deficiency of Aſſets, abate in Proportion with other pecuniary Legacies. 423

Whether a Legacy of 200 *l.* given by the Teſtatrix for a Monument for her Mother ought, on a Deficiency of Aſſets, to abate in Proportion. *Page* 423

As Legatees are to abate in Proportion, ſo if an Executor pays one Legatee, and there is not enough to pay all, the Legatee who is paid ſhall refund in Proportion; ſo if one Legatee recovers his Legacy in Equity, and there is not enough to pay the reſt, he ſhall refund; *ſecus* if the Deficiency of Aſſets ariſes by the waſting of the Executor. 495

One having two Sons and a Daughter, by Will gives to each 2000 *l.* payable at twenty-one, provided if Aſſets fall ſhort to pay the Legacies, the Abatement to be born out of the Sons Legacy; the Teſtator leaves Aſſets to pay the whole, but the Executor afterwards waſtes; the Daughter's Legacy ſhall have the Preference. 668

In what Caſes a Legacy ſhall or ſhall not be a Satisfaction of a Debt or other Demand on the Teſtator's Eſtate.

A Man has one Daughter to whom 8000 *l.* was ſecured by Marriage Settlement, and afterwards he gives her 8000 *l.* by his Will for her Portion, and 200 *l.* *per Annum*; the Daughter ſhall have but one 8000 *l.* though ſhe may elect which of the Portions ſhe pleaſes. *Page* 147

Where a Father is bound to give a Portion with his Child, and afterwards by his Will give a Legacy to ſuch Child of as great or greater Value than the Portion, this is a Satisfaction of the Portion. 299

But a Legacy is not to be taken in Satisfaction of a Debt upon an open Account, where it is uncertain on which Side the Ballance lies; nor in Satisfaction of a Debt contracted after the making the Will. *ibid.*

One Covenants to leave his Wife 620 *l.* Party dies inteſtate, and the Wife's diſtributory Share comes to more; this is a Satisfaction. 324

One being indebted to his Servant for Wages in 100 *l.* gives her a Bond for this 100 *l.* as due for Wages, and afterwards by Will gives her 500 *l.* for her long and faithful Services; this is not a Satisfaction for the Bond. 408

Pecuniary Legacies are given by the Will, and afterwards greater Legacies are given to the ſame Perſons by the Codicil; theſe latter no Satisfaction for the former, becauſe the Codicil is Part of the Will, eſpecially where they are not *ejuſdem generis*. 423

Surplus and reſiduary Legatee. Vide Tit. **Executor**, and *In what Caſe the Executor ſhall be only a Truſtee for the Surplus.*

Ademption of a Legacy.

Teſtatrix deviſed to her Grandchild a Debt of 4000*l.* owing to her by *J. S.* provided if any Part of the Debt ſhould be paid in before the Teſtatrix's Death, then ſo much to be made good to the Granchild out of the Surplus of the Teſtatrix's Eſtate; afterwards the Teſtatrix releaſed 2000 *l.* of the ſaid Debt to *J. S.* without having received any of the Money; decreed that this was no Ademption of the Legacy *pro tanto*, but that the Legatee or her Repreſentatives were entitled to the whole 4000 *l.* as much as if the ſame had been paid in to the Teſtatrix. *Page* 461

A fortiori if the Teſtatrix had called in the Debt, it would have been no Ademption. 464

A Father by Will gives his Daughter a Portion of 500 *l.* and afterwards in his Lifetime gives her 300 *l.* for her Portion in Marriage, and four Years afterwards dies without revoking the Will, the Husband is a Bankrupt; the Aſſignees not entitled to the 500 *l.* Legacy, nor any Part thereof. 681

Limitation of Terms for Years, Vide this Title under *Eſtate for Years.*

Statute of Limitations.

Where a Bill in Equity abates by Death, if the Executor or Adminiſtrator will not revive within ſix Years, it is within the Statute of Limitations; but if there be a Decree to account, and the Suit afterwards abates by Death, and the Executor does not revive within ſix Years, this is not within the Statute. *Page* 742

London **and the Cuſtom thereof.**

A. a Freeman of *London* purchaſes in the Name of *B.* who at the Time of the Purchaſe executes no Declaration of Truſt, *A.* dies, after which *B.* gives a Declaration of Truſt; this good againſt the Cuſtom. 321

Where a Freeman of *London* leaves no Wife, the Children are entitled to one Moiety of his perſonal Eſtate, the other Moiety being the dead Man's Part. 341

Grandchildren of a Freeman are not within the Cuſtom to come in for an Orphanage Part. *ibid.*

A Freeman's Son has had ſeveral Sums from his Father, the Certainty whereof does appear,

appear, he has likewiſe had ſeveral other Sums, the Certainty whereof does not appear otherwiſe than by the Son's Anſwer; theſe being all brought into Hotchpot, the Son ſhall come in for his Orphanage Part. *Page* 342

A Jointure made by a Freeman on his Wife in Bar of Dower, will not bar her of the Cuſtomary Part, unleſs that be alſo expreſly mentioned. 530

Land, or Money covenanted to be laid out in Land, not within the Cuſtom of *London*. 532, 647

A Freeman of *London* may at any Time during his Life, even in his laſt Sickneſs, inveſt his perſonal Eſtate in Land, which will ſtand good, though the Freeman ſhall have ſaid he did this on Purpoſe to defeat the Cuſtom. 532, 719

Where a Freeman leaves his Widow a Legacy, and there is ſufficient out of his Teſtamentary Part to pay the ſame, ſhe ſhall have her Legacy and Cuſtomary Part alſo. 533

On a Freeman's Widow's Cuſtomary Part being barred by Compoſition, who ſhall have the Benefit of it; whether the Husband or Children; alſo whether a Child's Orphanage Part be barrable by a Releaſe or Covenant for a valuable Conſideration. 634

On a Child's releaſing to his Father his Orphanage Part, if the Releaſe be gained by Threats or unduly, the ſame will be ſet aſide in Equity. *Page* 639

Leaſes given to a Child by a Freeman to be brought into Hotchpot and valued. 642

One for a valuable Conſideration contracts to become a Freeman of *London*, but dies before he has taken up his Freedom; his perſonal Eſtate ſhall be divided as if he had been a Freeman, but his Children not to be City Orphans. 710

Lunatick.

Where the Husband was a Lunatick, the Wife, though an *Iriſh* Peereſs, committed for not producing him. 701

Maintenance for Children. See alſo **Portions.**

A. On his Son's Marriage ſettles Lands on himſelf for Life, Remainder to the Son for Life, Remainder to Truſtees for 1000 Years for raiſing Portions for Daughters payable at twenty-one or Marriage, with Maintenance in the mean Time, to commence the firſt Quarter after the Father's Death; the Father dies leaving one Daughter, and the Grandfather living; the Bill prayed a Mortgage of the Reverſion for the Infant's Maintenance, but the

the Court ſtrongly inclined againſt it. *Page* 488

In the Court's allowing Maintenance out of a Jew's Eſtate to his Daughter turned Proteſtant, by Virtue of 1 *Ann. cap.* 30. it is no Objection that the Daughter is above forty Years of Age, or married, or that the Jew is dead. 524

Mandamus.

A *Mandamus* lies to the Spiritual Court to direct them to do Right, as a Prohibition does to ſtop them from doing Wrong. 47

Whether Error lies on a Rule or Award of a *Mandamus.* 348

Writ of Error on a Judgment on a *Mandamus* ſince the Statute 9 *Ann.* no *Superſedeas* to a peremptory *Mandamus.* 351

Marriage, ſee under Tit. **Baron and Feme.** *Agreements on Marriage, and Underhand Agreements in Fraud of Marriage Agreements*, ſee under Tit. **Agreement.**

Marriage-brocage Bonds.

Husband before Marriage covenants to give a Releaſe to the Wife's Guardian of all Accounts; this Agreement ſet aſide in Equity, being within the ſame Miſchief as a Marriage-brocage Agreement. *Page* 118

A Son on his Marriage being to have 3000 *l.* Portion with his Wife, privately, without Notice to his Parents who treated for the Match, gives a Bond to the Wife's Father to pay back 1000 *l.* of the Portion ſeven Years afterwards; this Bond void in Equity, and will not be made better by being aſſigned to Creditors. 496

Reſtraints on Marriage.

One by Will leaves an Annuity to his Grandaughter, but if ſhe marries with the Executor's Conſent, then a Portion; the Daughter without the Conſent, *&c.* marries a Man worth nothing; the Husband not entitled to the Portion, the having married with the Conſent of the Executor being a Condition precedent to the veſting of the Portion. 284

Money.

Money agreed to be laid out in Land, ſee **Agreement**; alſo *Matters controverted between the Heir and Executor*, under **Heir**, and alſo **Election.**

Mortgage. Vide **Intereſt.** *As to buying in Incumbrances, and what Uſe may be made thereof*, vide Tit. **Securities.** *As to Concealment of Mortgages*, vide **Concealment.**

Where Money is agreed by Articles to be laid out in Land, the Party who would have the ſole Intereſt in the Land when bought, may (if of Age) elect to have the Money paid to him, and that it ſhould not be laid out in Land. *Page* 130, 389, 470

Husband borrows Money, and he and his Wife levy a Fine of the Wife's Land as a Mortgage for it, after which the Husband by Will gives Legacies to Charities to the Amount of his perſonal Eſtate; the Mortgage ſhall be paid out of his perſonal Aſſets, though the charitable Legacies are loſt thereby; but all the Husband's Debts, though by Simple Contract, ſhall be preferred to the Mortgage. 264

Mortgage may be without a Covenant or Bond for Payment of the Money. 271

One agrees for a valuable Conſideration to convey Lands to *J. S.* and afterwards makes a Mortgage for a valuable Conſideration, and without Notice; the Mortgagee ſhall hold his Mortgage againſt the intended Purchaſer; *ſecus* of a Judgment Creditor who has only a general Security, and no Specific Lien upon the Land. *Page* 277, 279

Mortgage in Fee is made redeemable upon Payment of 300*l.* and Intereſt, upon any *Michaelmas* Day upon ſix Months Notice; Mortgagor dies, having deviſed his perſonal Eſtate to his Wife; perſonal Eſtate liable to pay the Mortgage. 291

A Covenant to pay the Mortgage Money not ſuable in Equity, unleſs the Covenantor receives the Money; as where a Feme Sole ſeiſed of Land mortgages and marries *B.* who on an Aſſignment of the Mortgage covenants to pay the Money, and dies; *B.*'s perſonal Eſtate not liable in Equity to pay it. 347

Where a firſt Mortgagee is a Witneſs to the ſecond Mortgage, tho' no actual Proof of his knowing the Contents thereof, yet ſince the Preſumption is, that he might have known the ſame, this ſhall poſtpone him. 394

Mortgagee of a Ship by Deed truſts the Mortgagor with the original Bill of Sale, who indorſes thereon ſubſequent Mortgages or Bills of Sale of ſeveral Parts of the Ship, and Mortgagee acquieſces; this is Evidence of an Aſſent in ſuch Mortgagee, and ſhall poſtpone him. *ibid.*

Mortgagee ſhall not onerate his Pledge with Coſts which he occaſions by an unjuſt Defence. 395

If there are not Aſſets to pay all the Legacies, a Mortgagee, where the Security is ſufficient, ſhall not be paid out of the perſonal Eſtate. *Page* 730, 731

Special Agreements touching the Redemption of Mortgages.

One for 800 *l.* Conſideration grants a Rent-Charge of 48 *l. per Ann.* in Fee, upon Condition, that if the Grantor ſhall give Notice, and pay in the 800 *l.* by Inſtalments, *viz* 100 *l.* at the End of every ſix Months, and ſhall do this during his own Life-time, the Grant to be void; the Mortgage was made about 60 Years ſince, when the legal Intereſt of Money was 8 *l. per Cent.* and the Mortgagor dead; decreed not redeemable. 268

In Caſe of a Mortgage, no Clauſe can confine the Equity of Redemption to the Life-time of the Mortgagor, or to him and the Heirs Male, or the Heirs only of his Body. 269

Redemption, Foreclоſure.

Exchequer Annuities mortgaged may be ſold upon Notice without a Decree of Foreclоſure. 261

Mortgage of a Rent redeemable at a greater Diſtance of Time than a Mortgage of Land. 270

Mortgage tho' ever ſo old is redeemable, if Intereſt has been paid. *Page* 271

Firſt Mortgagee takes a Releaſe of the ultimate Equity of Redemption; this does not oblige him to pay off the intermediate Mortgages, if he will waive the Releaſe. 395

One ſeiſed in Fee mortgages to *A.* and afterwards binds himſelf and his Heirs by Bond to *A.* and dies; if the Heir comes to redeem this Mortgage, he muſt pay off the Bond as well as the Mortgage, but the Aſſignee of the Heir may redeem upon paying the Mortgage only. 775

So if one poſſeſſed of a Term for Years mortgages it to *A.* and afterwards becomes indebted by Simple Contract to *A.* and dies, his Executor ſhall not redeem the Term without paying as well the Note as the Mortgage; *ſecus* if any Creditor of the Teſtator brings his Bill to redeem. 776, 777

Ne exeat Regnum. See Tit. **Writ.**

Notice.

WHERE *a firſt Mortgagee who atteſts a ſecond Mortgage will be preſumed to have had Notice*, ſee under Tit. **Mortgage.**

The Court cannot take Notice of Foreign Laws and Cuſtoms, unleſs they are proved. *Page* 431

Obligations. Vide **Bonds.**

Oath. Vide alſo **Affidavit.**

A Peer of the Realm is to put in his Anſwer upon Honour: But his Examination on Interrogatories, or as a Witneſs, muſt be upon Oath. 146

Where the Suit was frivolous, a Quaker Defendant was allowed to put in his Anſwer without Oath or Affirmation. 781

Occupant.

A. by Will deviſes Lands to Truſtees and their Heirs, in Truſt to divide the Profits equally between his Wife and Daughter (the Heir of the Teſtator) during the Wife's Life, and after her Death he deviſes the ſame to the Uſe of his Daughter in Tail, with Remainders over; the Daughter dies without Iſſue and inteſtate during the Mother's Life; reſolved that the Mother and Daughter were Tenants in Common, and that the Mother ſhould have a Moiety of the Profits during her Life, and that the other Moiety by the Statute of Frauds and Perjuries ſhould go to the Executors, &c. of the Daughter, as before that Statute it would have been liable to Occupancy, and not to the Heir of the Teſtator, as Profits undiſpoſed of and reſulting to him. *Page* 34

Offer.

An Offer made during a Treaty which afterwards breaks off, or upon Terms which are not accepted, not binding. 497

Office.

Appointment by Deed of particular Annuities to be paid out of an Office, countermandable. 101

Original.

After Judgment in an Action on a Policy of Inſurance, if Error be brought to reverſe ſuch Judgment for want of an Original, the Court will not permit the Party to file an Original, in Regard if this Judgment were reverſed, the Plaintiff may begin a new Action; *ſecus* were it in a *Quare Impedit*, or in an Action againſt the Hundred for a Robbery, where the Suit muſt be commenced within a limited Time; or had the Time been ſo far elapſed, as that the Statute of Limitations had been a Bar if the Judgment ſhould be reverſed. 412

The

The Plaintiff recovered Judgment in an Action at Law, but by Means of the Illneſs of his Attorney, who had been diſordered in his Head, an Original was omitted to be filed, and for want thereof a Writ of Error brought; upon Affidavit of this, the Court gave Leave, upon paying the Coſts of the Writ of Error, to file an Original. *Page* 412, 413

Inſtructions for an Original againſt an Hundred for a Robbery were brought to the Curſitor within the Year, but the Writ paſſed the Great Seal after the Year, though teſted within the Year, *viz.* when the Inſtructions were brought; this held good, being warranted by the Practice of the Curſitors Office. 437

Orphan. Vide **London.**

Outlawry.

A. having outlawed *B.* brings a Bill againſt *B.* and likewiſe againſt *C.* a Truſtee for *B.* with reſpect to an Annuity, to ſubject this Annuity to the Plaintiff's Debt; the Attorney General ought to be made a Party, and the Plaintiff muſt get a Leaſe or Grant in the Court of Exchequer from the Crown. 445

Where an Executor in Truſt was outlawed, and a Witneſs proved that he had inquired after, and could not find him; held not neceſſary to make him a Party. *Page* 684

Debt againſt the Sheriff for an Eſcape of one in Execution on an Outlawry after Judgment, may be brought either in the *tam quam*, or at the Suit of the Party only. 687

Papiſt.

WHERE a Papiſt is diſabled to take Land, how far Equity will help the next Proteſtant Heir to take Advantage of his Diſability. 353

By the Statute of 11 & 12 *W.* 3. againſt the Growth of Popery, a Papiſt under eighteen is diſabled to take only till Conformity; if above eighteen, diſabled for ever. 354

Paraphernalia.

One dies indebted by Bond more than all his perſonal Aſſets can pay; the Widow ſhall have her *Bona Paraphernalia*, provided there be real Aſſets to ſatisfy the Bond. 729

Bona Paraphernalia not deviſable any more than Heir-Looms. 730

Pardon.

A general Act of Pardon, tho' with an Exception of all Offences

fences and Contempts proſecuted at the Charge of any private Perſon or Perſons, yet held to pardon a Contempt in marrying a Ward of a Court of Equity. *Page* 696

Parol. Vide *Agreement Parol.*

Parol Evidence. Vide **Evidence.**

Parliament (Act of). Vide **Statutes.**

Privilege of Parliament.

Suing the Bail below, pending a Writ of Error in Parliament, is a Contempt and Breach of Privilege. 685

Partners.

A. and *B.* Partners in a Goldſmith's Trade, are bound in a Bond to *J. S.* *A.* and *B.* break off the Partnerſhip and divide their Stock; *J. S.* the Obligee in the Bond, knows this, and that *A.* took upon him to pay the Debts, and after a great Diſtance of Time brings a Bill againſt the Executor of *B*; yet he (*J. S.*) ſhall recover. 682

Parties.

One ſeiſed of Lands in Fee binds himſelf and his Heirs in a Bond, and deviſes his Lands to *J. S.* in Fee, and dies; in a Bill brought by the Obligee in the Bond to ſubject the Deviſee to the Payment of Debts, the Deviſor's Heir muſt be made a Party. *Page* 99

Where a Bill wants proper Parties, it is in the Power of the Court to diſmiſs the Bill *ſans* Prejudice, or to give Leave to amend, paying Coſts. 428

A. having outlawed *B.* brings a Bill againſt *B.* and likewiſe againſt *C.* a Truſtee for *B.* with reſpect to an Annuity, to ſubject this Annuity to the Plaintiff's Debt; the Attorney General ought to be made a Party. 445

In a Suit on Behalf of a Charity for the Arrears of a Rent-Charge, not neceſſary to make all the Ter-tenants of the Land, out of which the Rent iſſues, Parties. 599

They only are Parties to a Bill againſt whom Proceſs is prayed. 593

Where an Executor in Truſt was outlawed, and the Witneſs proved that he had inquired after, and could not find him, held not neceſſary to make him a Party. 684

Partition.

On a Partition in Chancery every Part of the Eſtate need not be divided, but ſufficient if each Tenant in Common, *&c.* has an equal Share of the Whole. 446

Patronage. See **Preſentation.**

Payment of a Legacy, to whom to be made. Vide **Legacy.**

Peer.

A Peer of the Realm is to put in his Anſwer upon Honour, but his Anſwer to Interrogatories, and Examination as a Witneſs, muſt be upon Oath. *Page* 146

Firſt Proceſs of Contempt againſt a menial Servant of a Peer is a Sequeſtration *Niſi*, as againſt the Peer himſelf. 535

Since the Union, a *Scotch* Peer made an *Engliſh* Peer cannot by Virtue thereof ſit and vote in Parliament. 582

A Peerage granted to an Infant cannot be waived by him when he comes of Age. 586

Whether the Crown may create one a Peer againſt his Will. 592

Perpetuity. Vide alſo *Limitations of Terms for Years* under Tit. **Eſtates.**

Deviſe of Lands to a Corporation, in Truſt to convey the Premiſſes to the Teſtator's Godſon *A.* for Life, and ſo to his firſt Son for Life, and afterwards to the firſt Son of that firſt Son for Life, and in Default or Failure of ſuch Iſſue of *A.* to convey them to *B.* for Life, *&c.* this is a Perpetuity; but the Conveyance ſhall be made as near the Intent of the Party as the Rules of Law will admit, (*viz.*) by making all the Perſons in Being Tenants for Life only, but the Limitation to the Sons unborn muſt be in Tail. *Page* 332

Perſonal Eſtate.

Where the perſonal Eſtate ſhall be applied to exonerate the real. Vide Tit. **Real Eſtate.**

One deviſes all his Money in the Government Funds to be laid out in the Purchaſe of Land to be ſettled on the eldeſt Son of *A.* and the Heirs Male of his Body, Remainder over, and deviſes the reſt of his perſonal Eſtate to be ſettled in the ſame Manner; the perſonal Eſtate cannot be intailed, but the whole veſts in the eldeſt Son. 290

Plaintiff.

The Court cannot make an Order to examine a Plaintiff *de bene eſſe*, as they will to examine a Defendant; and if the Plaintiff is an immaterial one, the Defendant ought to have demurred to him. 595

Plate.

By what Words it ſhall paſs. See **Expoſition of Words.**

Plea.

A Plea upon the Statute of 4 & 5 *Annæ*, *cap.* 17. in Relation to Bankrupts muſt conclude to the Country, and not to the Court. *Page* 258

By Imparling generally the Juriſdiction is admitted, and no foreign Plea will be received afterwards. 477

Poor.

A Bequeſt to one's *poor* Relations how conſtrued. 327

See **Expoſition of Words.**

Liberty of the *Rolls* in *Middleſex* is within the Pariſh of St. *Dunſtan*'s in the *Weſt*, *London*, and contributes a Fifth towards the Repairs of the ſaid Church; but having diſtinct Overſeers, and maintaining its Poor ſeparately, is not entitled to a Share of the Charities given by Will or Deed to the Poor of St. *Dunſtan's*, though entitled to a Fifth of all Collections made at the Church-Door or at Sacraments. *669*

Before the Statute of 43 *Eliz.* no ſuch Officers as Overſeers of the Poor. 670

Portions or Proviſions for Children. See alſo Tit. **Maintenance.** See *Legacies or Portions veſted* under Tit. **Legacy.** See *Truſt for raiſing Portions and Payment of Debts* under Tit. **Truſt.**

A Man has one Daughter to whom 8000 *l.* is ſecured by Marriage Settlement, and afterwards he gives her 8000 *l.* by his Will for her Portion and 200 *l.* *per Annum*; though the Daughter when of Age may elect which Portion ſhe pleaſes; yet ſhe ſhall have but one 8000 *l.* *Page* 147

The eldeſt Daughter, where there is a Son, or where the Eſtate by a Settlement goes all to a Remainder-man, is as a younger Child in Equity, and as ſuch entitled to a Share of the Proviſion appointed for younger Children. 244, 451

Where a Father is bound to give a Portion with his Child, and afterwards by his Will gives a Legacy to ſuch Child of as great or greater Value than the Portion; this ſhall be taken in Satisfaction of the Portion. 299

In a Term raiſed to ſecure a Daughter's Portion, the Truſts were declared, that if the Huſband ſhould leave no Heir Male by the Marriage, and ſhould leave a Daughter or Daughters, then the Truſtees were to raiſe Portions payable

payable to Daughters at twenty-one or Marriage; provided that if the Husband ſhould die without leaving a Daughter living at his Death, then the Term to ceaſe; there is no Iſſue Male by the Marriage, but there is a Daughter who attains twenty-one and marries; the Mother dies, and the Daughter alſo dies in the Father's Life-time leaving Iſſue, her Husband adminiſters to her, he ſhall have no Portion. *Page* 401

Truſt of a Term to raiſe Portions out of Rents and Profits, to be paid as ſoon as conveniently might be; by Virtue of the Word *Profits* Truſtees may ſell or Mortgage; *ſecus* if ſaid *annual* Profits. 415

Proviſion for Children *to be begotten*, ſhall extend to Children *already begotten.* 426

Term created for Daughters Portions, commencing after the Death of the Father and Mother, upon Truſt to raiſe the Portions *from and after the Commencement of the Term*; Father dies leaving a Daughter; decreed the Portion is veſted, but not raiſable during the Life of the Mother. 448

Father by Will gives a Portion of 500*l.* and afterwards in his Life-time gives her 300*l.* for her Portion in Marriage, and four Years afterwards dies without revoking the Will; the Husband is a Bankrupt; the Aſſignees not entitled to the 500*l.* Legacy, nor any Part thereof. 681

A reverſionary Term decreed (though *reluctante Curiâ*) to be ſold for raiſing a Daughter's Portion. *Page* 707

Poſſibility. See alſo *Limitations of Terms for Years* under Tit. *Eſtate for Years.*

Whether a Poſſibility be not aſſignable by the Commiſſioners of Bankruptcy. 385

A. deviſes a Term for Years to *B.* for Life, Remainder to *C.* who in the Life of *B.* deviſes his Remainder to *D.* this is a good Deviſe, though of a Poſſibility, and amounts in Equity to a Declaration by Will, that *C.*'s Executors ſhall ſtand poſſeſſed of the Term in Truſt for the Deviſee. 572

Poſthumous.

Where there is a Power to charge Lands for Portions for younger Children *living at the Father's Death*, a Poſthumous Child is within that Power. 245

One deviſes the Surplus of his Eſtate to his Children and Grandchildren *living at his Death*; a Child or Grandchild *in Ventre ſa mere* at the Teſtator's Death will take. 342

One deviſes, in caſe he leaves no Son at the Time of his Death, to *J. S.* the Teſtator dies leaving his Wife *privement enſient* with a Son; this

this Poſthumous Son is a Child living at the Teſtator's Death, and *J. S.* not entitled. *Page* 486

Power.

Where Tenant in Tail has a Power to make Leaſes, this not void, being intended to enable him to bind the Reverſion or Remainder without Fine or Recovery, which Power he has not by 32 *H.* 8.

Deviſe to *A.* (the Teſtator's Wife) for Life, and then to be at her Diſpoſal, provided it be to any of his Children; gives her an Eſtate for Life, with a Power to diſpoſe of the Fee; and where ſuch Deviſee with an after-taken Husband did by Leaſe and Releaſe and Fine convey the Premiſſes to a Truſtee and his Heirs, to the Uſe of herſelf for Life without Impeachment of Waſte, Remainder to her Daughter by her firſt Husband, and the Heirs of her Body, Remainder to the Son by her firſt Husband and his Heirs; this adjudged a good Execution of the Power. 149

Power to charge Lands for Portions for younger Children living at the Teſtator's Death; a Child *in Ventre ſa mere* is a Child within the Power. 245

Where Lands are ſettled on *A.* for Life, Remainder to ſuch Woman as he ſhall marry for Life, Remainder over, with Power for him to charge the Premiſſes with any Sum of Money; ſuch Power, unleſs there be a Clauſe inſerted to the contrary, will, like a Power of leaſing, overreach all the Eſtates. *Page* 246

A Settlement is directed to be made on *A.* with a Power to make a Jointure of a Moiety, *A.* before the Settlement makes a Jointure of what exceeds a Moiety; the Court will take no Notice of this during the Husband's Life, for it may never take Effect. 604

Where there is a Power to appoint an Uſe of Land by Deed or Will; a Will atteſted by two Witneſſes not a good Appointment, it being to be intended ſuch a Will as is proper to diſpoſe of Land. 741

So though it be by any Writing in Nature of a Will. *ibid.*

Tenant for ninety-nine Years, if he ſo long live, with Power of charging the Premiſſes with Sums of Money, joins in ſuffering a Recovery, and in declaring new Uſes thereof; this Extinguiſhes the Power of charging. 777

Diverſity betwixt a Power annexed to an Eſtate, and one collateral thereto, the firſt paſſing with the Eſtate, the other not. 778

Power of Revocation. See **Revocation.**

Prerogative of the Crown.

In Proſecutions of the Crown, though ſince the late Statute of the 4 & 5 *Annæ*, the *Venire facias* which was awarded *de Vicineto*, and not *de Corpore Comitatûs*, was held good. *Page* 223

On the Crown's bringing a *Scire facias* to repeal a Charter, the Defendant ſhall pay Coſts on a new Trial. 224

A Choſe in Action may be aſſigned to the King, and he or his Grantee ſue for it in their own Name. 252

The King may reſerve a Rent out of Things incorporeal, and may diſtrain for this Rent on any other Lands of the Tenant, but not on ſuch Lands of the Tenant as are let out by him or extended. 307

An Appeal lies from a Decree in the *Iſle of Man* to the King in Council, to prevent a Failure of Juſtice; altho' in the Grant made of that Iſland by the Crown there may have been no Reſervation of the King's Right to determine on ſuch Appeals. 329

Whether the King has Power to make a Man a Peer againſt his Will. 592

Upon an Outlawry, the Crown is not a Truſtee for the Plaintiff, but it is merely *ex gratiâ* that a Grant is made of the Goods of the Perſon outlawed to the Plaintiff in Satisfaction of his Debt. 690

Preſentation to a Church or Chapel.

The Building and Endowing of a Church originally entitled one to the Patronage. *Page* 774

The Impropriator of a Pariſh has no Right to nominate a Preacher to every Chapel within the Pariſh, much leſs is he compellable ſo to do. *ibid.*

One may build a private Chapel for himſelf and Neighbours, or for himſelf and twenty Neighbours, and this will not give the Parſon a Right to nominate a Preacher there. *ibid.*

Privilege. See Parliament.

Probate. See under Tit. Will.

Proceſs.

If the Party's Clerk in Court be dead, no Proceſs can be taken out againſt the Party until he has appointed a new Clerk in Court, for which Purpoſe a *Subpœna ad faciend' Attorn'* muſt be taken out, the leaving of which at the Houſe of the Party is good Service. 420

A. being beyond Sea ſues *B.* at Law, who brings a Bill in Equity againſt *A.* the Court will order that Service on the Defendant's Attorney at Law ſhall be good Service, but not that ſuch Attorney ſhall put in his Anſwer without Oath. *Qu.* If the Defendant was in an Enemy's Country

Country where no Commiſſion could go to take the Anſwer. *Page* 523
They only are Defendants to a Bill againſt whom Proceſs is prayed. 593

Sequeſtration.

Whether a Grantee of a Fee-Farm Rent may diſtrain for the ſame upon Lands under Sequeſtration. 307
Firſt Proceſs of Contempt againſt a menial Servant of a Peer of the Realm is a Sequeſtration *Niſi*, as againſt the Peer himſelf. 535

Procurations.

Procurations are due of common Right for the Biſhop or his Vicar, the Archdeacon's inſtructing the Clergy, and properly demandable of the Curate, in Caſe of an Impropriation, in the Eccleſiaſtical Court. 657

Prohibition.

In Vacation-Time, on the Spiritual or other Court's exceeding their Juriſdiction, the Court of Chancery will grant a Prohibition. 43, 476

Proportion. Vide alſo **Average.**

Where there was Tenant for Life, Remainder to an Infant in Tail, Remainder to Tenant for Life in Fee, the Court would not value the Life Eſtate at more than one third. *Page* 650

Purchaſe, *as diſtinguiſhed from Deſcent*, vide **Heir.**

Purchaſe and Purchaſer.

On Caſualties happening between the Articles for a Purchaſe and the Sealing of the Conveyance, who ſhall bear the Loſs. 61
In Marriage Articles the Iſſue to be conſidered as Purchaſers. 145, 291
A Purchaſer before a Maſter ſubmitting to loſe his Depoſit, is not bound to proceed in the Purchaſe. 745

Quaker.

WHERE the Suit was frivolous, a Quaker Defendant allowed to put in his Anſwer without Oath or Affirmation. 781

Real Eſtate.

Where the perſonal Eſtate ſhall or ſhall not be applied to exonerate the real.

PAROL Proof admitted to ſhew the Teſtator's Intention that his Executrix ſhould

ſhould retain the perſonal Eſtate, and not apply it towards the Diſcharge of the Mortgage. *Page* 9, 116

Mortgage in Fee is made redeemable on Payment of 300*l.* and Intereſt, upon any *Michaelmas* Day on ſix Months Notice; Mortgagor dies, having deviſed his perſonal Eſtate to his Wife; the perſonal Eſtate is liable to pay the Mortgage. 291

One having mortgaged his Fee-ſimple Eſtate, deviſes his Leaſehold to *A.* and his Fee-ſimple to *B.* and dies, leaving no other perſonal Eſtate; the Deviſe of the Fee-ſimple muſt take it *cum onere*, and ſhall not charge the Leaſehold Eſtate ſpecifically deviſed with the Mortgage. 693

Perſonal Eſtate not to be applied in Exoneration of the real, in Caſes where a Specific or other Legatee would be prejudiced; much leſs ſhall the *Bona Paraphernalia* of the Wife be ſo applied. 730

Recognizance. Vide alſo under Tit. **Securities.**

A Recognizance not inrolled ſhall be looked upon only as a Bond, and paid as a Debt by Specialty. 334

So a Recognizance not regularly taken may be ſued as an Obligation. 336

Where the Court permits the inrolling of a Recognizance after the Time elapſed, it always takes Care not to hurt an intervening Purchaſer. *Page* 340

Committee of an Infant Heireſs having given a Recognizance, conditioned that he ſhould not ſuffer the Infant to marry without the Conſent of the Court; the Form of this Recognizance was afterwards moderated, *viz.* that the Infant ſhould not marry *with the Committee's Privity* without the Conſent of the Court. 698

Recovery. See alſo **Entry.**

Where a Purchaſe is directed to be made, and the Land to be ſettled on *A.* in Tail, the Remainder over, it is moſt reaſonable for Equity to decree the Truſt to be executed, and the Eſtate ſettled with Remainder over; that ſo ſuch Remainder-man may have the Benefit of the Chance of Tenant in Tail's dying before his having ſuffered a Recovery. 91

Nothing leſs than a common Recovery ſuffered by *Ceſtui que Truſt* in Tail is ſufficient to bar the Remainder-man, or even the Iſſue. By the Opinion of Lord *Cowper*. *ibid.*

Upon a Settlement *A.* is made Tenant for Life, Remainder to the Heirs of his Body by his Wife, and in the ſame Deed *A.* covenants not to ſuffer a Recovery, but that the Lands ſhall be enjoyed according to theſe Limitations;

tions; *A.* does ſuffer a Recovery, and deviſes theſe Lands; the Recovery good to bind the Aſſets; but *A.* being Tenant in Tail, and as ſuch having Power to ſuffer a Recovery, the Lands deviſed ſhall not be affected. *Page* 104

Where Money is directed to be laid out in a Purchaſe of Land, and to be ſettled on *A.* for Life, Remainder to *B.* in Tail, Remainder to *C.* in Fee; if *A.* and *B.* bring a Bill for the Money, they ſhall not have it, becauſe of the Contingency to *C.* which cannot be barred without a common Recovery; *ſecus* where ſuch Remainder can be barred by a Fine only. 470

One ſeiſed in Fee of the Manors of *A.* and *B.* deviſes them to *C.* for Life, and if *C.* ſhall have Iſſue Male, then to ſuch Iſſue Male and his Heirs for ever; but if *C.* ſhall leave no Iſſue Male, the Manor of *A.* to *J. S.* in Fee, and that of *B.* to *J. N.* in Fee; *C.* ſuffers a Recovery of theſe Manors, it will bar the contingent Eſtates limited to *J. S.* and *J. N.* 509

In a Marriage Settlement the Husband was made Tenant for Ninety-nine Years, if he ſo long lived, Remainder to Truſtees during the Life of the Husband, *&c.* Remainder to the firſt, *&c.* Son by the Marriage in Tail Male, Remainder to the firſt, *&c.* Son by any other Wife, Remainder over; a Son is born and of Age, the Wife dead, and there are no other Sons by a ſubſequent Marriage, the Truſt for preſerving contingent Remainders deſcends to an Infant; if for the Benefit of the Family, Equity will decree the Infant Truſtee to join in a Recovery. *Page* 536

Releaſe.

A Will cannot operate as a Releaſe. 85

No Reaſon to ſet aſide a Releaſe becauſe the Party releaſing had a Right; *ſecus* if ignorant of his Right, or if the ſame was concealed from him. 239, 728

As to the Child of a Freeman's releaſing his Orphanage Part, ſee under Tit. **London**.

Rent. See alſo *Matters controverted between the Heir and Executor*, under **Heir**.

Leſſor dies on *Michaelmas* Day, and before Sun ſet; the Heir or Jointreſs, not the Executor, ſhall have the Rent. 177

[*Qu.* If the Leſſor had died after Sun ſet, and before Midnight. *ibid.*]

If the Tenant had paid the Rent on the Day, the Payment had been good, tho' the Leſſor had died before Sun ſet; but the Executors to account for this to the Jointreſs. *ibid.*

Quare tamen.

Where Leſſor reſerves a Rent, and dies on the Rent-Day about

about twelve at Noon, if the Leaſe muſt determine by his Death, the Rent, rather than be loſt, ſhall go to his Executors; *ſecus* if the Leaſe is to have a Continuance. *Page* 180

Tenant for Life leaſes for Years, rendring Rent half-yearly, and dies in the middle of the Half-Year; Equity will not apportion the Rent as to Time. 392

Vide autem 11 *Geo.* 2. by which Rent is apportioned in Point of Time.

J. S. Leſſee of Land to him and his Heirs for three Lives, aſſigns the Whole Eſtate, reſerving a Rent to him and his Executors, and dies; his Executors, and not his Heirs, are entitled to the Rent. 555

Fee-Farm Rent.

Patentees of Fee-Farm Rents have the ſame Power of Diſtreſs as the King had, and ſo may diſtrain on other Lands of the Tenant, though not ſubject to the Rent, but not on ſuch other Lands as are let out by the Tenant, or extended. *Qu.* If they may diſtrain on other Lands of the Tenant under Sequeſtration. 306, 307

Quit-Rent.

An Owner of a Quit-Rent ought to pay Taxes in Proportion only to what the Land pays; but if the Matter has been examined by the Commiſſioners of the Land-Tax, this Court will not re-examine it. *Page* 328

Rehearing.

On the Plaintiff's Petition to rehear, the Cauſe is open with reſpect to him as to thoſe Parts only complained of in the Petition; whereas the Defendant is at Liberty to object againſt every Part of it. 300

Revocation.

Revocation of a Will, ſee under Tit. **Will.**

An Appointment by Deed of particular Annuities to be paid out of an Office, is in its Nature revocable. 101

Of two voluntary Settlements, if the firſt is made without a Power of Revocation againſt the Intent of the Party, the ſecond ſhall prevail. 581

Satisfaction.

In what Caſes a Legacy ſhall be a Satisfaction, ſee under Tit. **Legacy**, and **Portions**.

One covenants to leave his Wife 620 *l.* and dying inteſtate, her Share comes to more; this held a Satisfaction. 324

School and School-Maſters.

The Spiritual Court has Juriſdiction of Grammar Schools; but in Caſe of a Libel for teaching School generally, without Licence, if it does not appear what School, the Temporal Courts will grant a Prohibition. *Page* 29

Two Schools in the ſame Town, one a Free School and the other a Charity School for Boys and Girls; *A.* deviſes 500*l.* to the Charity School, though both be Charity Schools, yet only that for Boys and Girls ſhall take. 674

Scotland.

A *Ne exeat Regnum* lies to prevent one's going to *Scotland*; but in ſuch Caſe the Condition of the Recognizance muſt be particularly worded. 263

Since the Act of Union, a *Scotch* Peer made an *Engliſh* Peer cannot by Virtue thereof ſit and vote in Parliament. 582

In *Scotland* the Trials and Proſecutions for Treaſons are by the late Statute of Union the ſame as in *England*. 617

Securities and Incumbrances, Judgment, Statute and Recognizance.

A Statute Creditor of *J. S.* if *J. S.* becomes Bankrupt, and the Statute not ſued and executed before the Bankruptcy, ſhall come in only *pro ratâ*, though there were Lands in Fee bound by the Statute. *Page* 92

A Truſtee confeſſes a Judgment; this will not in Equity bind the Eſtate. 278

A. conveys an Eſtate by a Conveyance that is defective, (as for want of Livery) and afterwards confeſſes a Judgment; this ſhall not in Equity affect the Eſtate. 279

Mortgagee of a Ship is Witneſs to a ſecond Mortgage thereof; though no actual Proof of his knowing the Contents, yet ſince the Preſumption is, that he might have known them, this ſhall poſtpone him. 394

Mortgagee of a Ship by Deed intruſts the Mortgagor with the original Bill of Sale, who indorſes thereon ſubſequent Mortgages or Bills of Sale of ſeveral Parts of the Ship, and the Mortgagee acquieſces; this is Evidence of an Aſſent in ſuch Mortgagee, and ſhall poſtpone him. *ibid.*

One agreeing to leave his Wife 1000*l.* within three Months after his Death, cannot be inforced in Equity to amend the Security. 460

A. a Trader, ſeiſed in Fee of Lands, gives Judgment to *B.* and having ſold the Land to *C.* becomes a Bankrupt; though the Judgment Creditor cannot come in for more than his Proportion with the other Creditors of the

the Bankrupt, whether he may not extend the Land in *C.* the Purchaſer's Hands. *Page* 737

So if *A.* the Trader had given Judgment to *B.* and having articled for a valuable Conſideration to ſell to *C.* had become a Bankrupt, the Judgment ſhould have bound the Land in the Hands of *C.* but whatever Money the Purchaſer had been to pay to the Bankrupt ſhould have been liable to the Bankruptcy. *ibid.*

Sequeſtration. See under Tit. **Proceſs.**

Sheriff.

Debt againſt the Sheriff for an Eſcape of one in Execution on an Outlawry after Judgment, may be brought either in the *tam quam*, or at the Suit of the Party only. 687

Solicitor. See **Attorney.**

South-Sea Stock.

A Bill in Equity will not lie for a Specific Performance of an Agreement to transfer *South-Sea* Stock. 570

Specific Performance, *when to be decreed and when not*, ſee under Tit. **Agreement.**

Specific Deviſe or Legacy. See **Legacies.**

Specific Lien, or not.

Upon a Settlement *A.* is made Tenant for Life, Remainder to the Heirs of his Body by his Wife; and in the ſame Deed *A.* covenants not to ſuffer a Recovery, but that the Lands ſhall be enjoyed according to theſe Limitations; *A.* does ſuffer a Recovery, and deviſes the Lands; the Covenant good to bind the Aſſets, but *A.* being Tenant in Tail, and as ſuch having Power to ſuffer a Recovery, the Lands deviſed ſhall not be affected. *Page* 104

One agrees for a valuable Conſideration to convey Lands to *J. S.* and afterwards confeſſes a Judgment to *J. N.* if the Conſideration Money paid by *J. S.* be any ways adequate to the Value of the Lands, it binds the Lands in Equity, and ſhall defeat the Judgment; *ſecus* of a Mortgage, or if the Conſideration were inadequate. 277

A. ſurrenders a Copyhold by way of Sale or Mortgage, but the Surrender is not preſented, and *A.* becomes a Bankrupt; this will bind the Eſtate in Equity. 280

One Covenants before Marriage to ſettle certain Lands on his Wife for Life, and afterwards deviſes theſe Lands for Payment of Debts, the Covenant is a ſpecific Lien on the Lands;

Lands; *ſecus* of a Covenant to ſettle Lands of the Value of 60*l. per Annum*, without mentioning any Lands in certain. *Page* 429

Spiritual Court.

The Spiritual Court has Juriſdiction of Grammar Schools; but in Caſe of a Libel for teaching School generally, without Licence, if it does not appear what School, the Temporal Courts will grant a Prohibition. 29

A *Mandamus* lies to the Spiritual Court to direct them to do Right, as a Prohibition does to ſtop them from doing Wrong. 47

An Injunction upon an Attachment or *Dedimus, &c.* does not extend to ſtay Proceedings in the Spiritual Court without ſpecial Order. 301

An Executor proves a Will of a perſonal Eſtate, wherein one of the Legacies is forged; the Spiritual Court having a proper Juriſdiction of this Matter, the Executor is without Remedy in Equity 388

The Spiritual Court has no Power to make a Tranſlation of a Will. 527

The Spiritual Court cannot compel a Diſtribution of the undiſpoſed Surplus of a perſonal Eſtate, and why. 549

The Spiritual Court has Power to determine concerning the Right of Proxies or Procurations. 657

Where a Thing is claimed by Cuſtom in the Spiritual Court, it muſt be intended according to their Law, by which forty Years make a Cuſtom or Preſcription. *Page* 663

Statutes.

Whether a Preamble of an Act of Parliament be proper to explain the general Words in the Body. 317, 320

Statute of Limitation. See **Limitation.**

Statute of Frauds and Perjuries. Vide under **Agreement.**

Subpœna. See Tit. **Proceſs.**

Surety. See **Bail.**

Survivor. See **Jointenants.**

Taxes.

AN Owner of a Quit-Rent ought to pay Taxes in Proportion to what the Land pays; but if the Matter has been examined by the Commiſſioners of the Land-Tax, this Court will not re-examine it. 328

Tenants in Common. See **Jointenants.**

Term for Years and attendant on the Inheritance. See *Limitation of Term for Years* under *Eſtate for Years.*

Term and Vacation.

In Vacation-time one may reſort to the Chancery for a Prohibition returnable into *B. R.* or *C. B.* *Page* 43, 476

Though the next Day after the laſt Day of the Term be not in Strictneſs Part of the Term, and therefore no Motion can then be made on the Petty-Bag's Side in Chancery, yet as to other Purpoſes it is Part of the Term; for which Reaſon a Motion made at that Time to diſmiſs a Bill for want of Proſecution, on a Certificate that there had been no Proſecution within three Terms, of which the laſt Term was one, was denied. 522

So where the laſt Seal continued three Days, and computing the third Day according to the Day of the Month, the Time would be expired for making a Report abſolute; yet this not ſo, it being only a Continuance of the firſt Day. *ibid.*

Trade.

Captain of a Ship dies leaving Money on Board, the Mate becomes Captain and improves the Money in Trade; he ſhall, on Allowance made him for his Care in the Management of ſuch Money, account for the Profits, and not for the Intereſt only. *Page* 140

A Bond or Promiſe to reſtrain one's ſelf from trading in a particular Place, if upon a reaſonable Conſideration, is good; *ſecus* if it be not given on a reaſonable Conſideration, or to reſtrain a Man from trading at all. 181

Trees. See **Waſte.**

Trial and new Trial.

Bill lies to perpetuate Teſtimony before Trial, on Affidavit annexed that the Plaintiff's Witneſſes are infirm and unable to travel. 117

Where the Jury bring in their Verdict contrary to the Direction of the Court, a new Trial may be granted even after a Trial at Bar. 212

In Proſecutions of the Crown, though ſince the late Statute of 4 & 5 *Annæ*, *cap.* 16. the *Venire facias* which was awarded *de Vicineto*, and not *de Corpore Comitatûs*, held good. 223

On a *Scire facias* to repeal a Charter, the Defendant ſhall not have a new Trial without paying Coſts. 224

In caſe of a Truſt-Eſtate deviſed to be ſold, or deviſed to *J. S.* if the Will be diſputed, Equity, after two Trials in its Favour

vour, will grant a perpetual Injunction. *Page* 671

So after ſeveral Trials in Ejectment, and Verdicts in all in Favour of the Will, Equity, on a Bill of Peace, will grant a perpetual Injunction. 672

Truſt and Truſtees.

Where a Purchaſe is directed to be made, and the Land ſettled on *A.* in Tail, with Remainder over; the Court ought not to decree the Money to be paid to *A.* but a Settlement to be made and the Truſt executed, that ſo the Remainder-man may have the Benefit of the Chance of Tenant in Tail's dying before his having ſuffered a Common Recovery. 91

Bare Articles, or only a Deed executed by *Ceſtui que Truſt* in Tail, ſeems hardly ſufficient to bar the Intail. *ibid.*

Truſt-Eſtates are to be governed by the ſame Rules as legal Eſtates. 109

One deviſes Lands for Payment of Debts, and then to *A.* for Life, with Power to make Leaſes, *&c.* Remainder to the Heirs Male of the Body of *A.* though this be but the Deviſe of a Truſt and executory, and expreſſed to be to *A.* for Life, yet it is an Eſtate-tail in *A.* barrable by a Fine; *ſecus* in caſe of Marriage Articles to ſettle Lands in that Manner. 142, 290

One who is a bare Truſtee, is a good Witneſs to prove the Execution of a Deed to himſelf. *Page* 290

A. a Freeman of *London* purchaſes Lands in the Name of *B.* but no Truſt declared, *A.* dies, and *B.* gives a Declaration of Truſt; this good againſt the Cuſtom. 321

Evidence of a Truſt, where an Eſtate is purchaſed in another's Name. *ibid.*

A. is a Truſtee for *B.* as to an Eſtate, and lays out Money in Relation thereto, after which *B.* aſſigns the Truſt to *C.* who brings a Bill for a Conveyance of the Eſtate; *C.* ſhall have no Conveyance until *A.* is paid all the Money by him expended or due in relation to the Premiſſes. 780

In what Caſes an Executor ſhall be only a Truſtee. See Tit. **Executor.**

Reſulting Truſt, and Truſt by Implication and Conſtruction.

Father buys an Eſtate in the Name of a younger Son and of a Truſtee, it ſhall be taken as an Advancement; ſo though a Reverſion be ſettled on the younger Son expectant on the Mother's Death, or though the Father received the Profits; provided, it was done only as Guardian, and during the Son's Minority. 111

Secus if the Father received the Profits after the Child's coming

coming of Age, and when of Diſcretion to claim his Right. *Page* 608

The Statute of Frauds and Perjuries, which ſays that all Conveyances, where Truſts or Confidences ſhall ariſe or reſult by Implication of Law, ſhall be as if that Act had never been, muſt relate to equitable Intereſts, and not to an Uſe, which is a legal Eſtate. 112, 113

A Truſt reſulting by Implication or Conſtruction may be rebutted by parol Evidence. 113, 115

One deviſes Lands to his Executors (who are no Relations) to ſell for the beſt Price, and to pay his Debts, Legacies and Funerals, ſo far as the ſame will extend, giving Legacies to his Heir at Law, and 100 *l.* to the Children of one of his Executors, but nothing to the Executors themſelves; decreed that the Executors were but Truſtees for the Heir at Law after Debts and Legacies paid. 390

A Grandmother buys an Annuity in the 14 *l. per Cent.* Lottery for 100 *l.* in the Grandchild's Name; the Child's Father gives the Grandmother a Bond to repay the 100 *l.* if the Child dies before the Grandmother, who receives the Income and keeps the Tally, the Grandchild making no Claim; this no Truſt for the Grandchild. 607

Truſt for raiſing Portions and Payment of Debts. See alſo under Tit. **Will.**

A Truſt-Term is raiſed to pay all Debts equally, and the Party dies indebted by Bond and Simple Contract; the Bond-Creditors may be paid Part of their Debts out of the perſonal Eſtate, and ſhall nevertheleſs come in upon the Truſt-Term for the Remainder equally with the Simple Contract Creditors. *Page* 228

Where a Truſt is raiſed to pay Debts, this is like a Mortgage, and the Simple Contract Debts ſhall carry Intereſt. 229

Where there is a Power to charge Lands for Portions for younger Children living at their Father's Death, a Poſthumous Child is within the Power. 245

Where the Truſt of a Term was to raiſe Portions out of Rents and Profits, to be paid as ſoon as conveniently might be; by Virtue of the Word *Profits* the Truſtees were held to be impowered to ſell or mortgage; *ſecus* if ſaid *annual* Profits. 415

One deviſes Lands to his Wife for Life, and after her Death to his Son in Fee, upon Condition to pay his Daughter 1000 *l.* within a Year after the Death of *J. S.* provided, if the Money be not paid, the Daughter may enter and receive the Profits till Payment

ment; *J. S.* dies living the Wife; the Daughter ſhall have the 1000 *l.* during the Life of the Mother, and in Default of Payment, Equity will decree a Sale of the Reverſion. *Page* 478

Where a Truſt was created for a Proviſion for Daughters *to be* born, this was held to extend to Daughters *then* born. 426

One deviſes his Lands for Payment of his Debts; Bond and Simple Contract Debts ſhall be paid equally; but if he only charges his Lands with the Payment of his Debts, ſo that the Lands deſcend ſubject to the Debts, the Bonds ſhall be preferred to the Simple Contract Debts. 430

But if the Heir ſells the Land before any Action brought, then both to be paid equally. 431

One deviſes all his *real Eſtate* to pay Debts, having Part Freehold and Part Copyhold, and dies without having ſurrendered the Copyhold to the Uſe of his Will; regularly the Copyhold ſhall not paſs without being mentioned, and if mentioned, Equity will on Behalf of Creditors ſupply the Want of a Surrender; but if the Freehold Eſtate be not ſufficient to pay the Debts, the Copyhold, being real Eſtate, ſhall be liable. 443

A Term was created for raiſing Daughters Portions commencing after the Death of the Father and Mother, upon Truſt to raiſe the Portions from and after the Commencement of the Term; Father dies leaving a Daughter; decreed the Portion was veſted, but not raiſable during the Life of the Mother. *Page* 448

Baron gives Feme the Foul Diſtemper, *A.* lends the Wife 30 *l.* to pay the Doctor for her Cure; Baron deviſes Lands for the Payment of his Debts; this 30 *l.* is a Debt of the Huſband's, and *A.* a Creditor in the Doctor's Place. 482

One deviſes Lands to his Executors until his Debts paid, the Remainder over, the Executors miſapply the Profits; they ſhall hold only until they might have paid the Debts by the Produce, after which the Lands are to be diſcharged, and the Executors only to be liable. 518

One borrows Money during his Infancy, and applies it to the buying of Neceſſaries; afterwards coming of Age, he deviſes his Lands for the Payment of his Debts; this Debt contracted during Infancy is within the Truſt. 558

The Truſt of a Term was to raiſe Portions for Daughters by Sale or Mortgage, Rents, Iſſues or Profits, and to be paid at the Daughters Ages of twenty-one, or Marriage, if after fourteen, or under, if with Conſent of the Mother; the Mother dies leaving four Daughters; the eldeſt after the Age of fourteen married, and with her Husband brought a Bill for the raiſing of her Portion in the Life-time of the Father; Court decreed a Sale of the Reverſionary Term for the raiſing thereof. *Page* 707

Truſtees for preſerving contingent Remainders.

Truſtees for preſerving contingent Remainders join in a Conveyance before the Birth of a Son; this is a Breach of Truſt againſt which Equity will relieve. 128

Truſtees for preſerving contingent Remainders in a voluntary Settlement, decreed to join in a Sale for Payment of Debts. 358

A Settlement was made by a third Perſon to the Uſe of the Husband for Ninety-nine Years, Remainder to Truſtees during his Life, *&c.* Remainder to the Wife for Life, Remainder to the firſt, *&c.* Son of the Marriage, Remainder to the Heirs of the Body of the Husband, Remainder to the right Heirs of the Husband; there was no Iſſue of the Marriage, and the Truſtees joined in cutting off the Remainders; yet the Court refuſed to puniſh them at the Suit of a remote Remainder-man. 359

A. ſettles Lands to the Uſe of himſelf for *99* Years, if he ſhould ſo long live, Remainder to Truſtees during his Life, *&c.* Remainder to the Heirs of his Body, Remainder to *A.* in Fee; *A.* has two Sons, and he, the Truſtees and the eldeſt Son, join in a Mortgage by Feoffment; the eldeſt Son dies without Iſſue; the ſecond Son, during the Life of the Father, has no Pretence to ſet aſide the Mortgage, though this ſeems a Breach of Truſt in the Truſtees. *Page* 387

In a Marriage Settlement the Husband is made Tenant for Ninety-nine Years, if he ſo long live, Remainder to Truſtees during the Life of the Husband, Remainder to the firſt, *&c.* Son of the Marriage in Tail Male, Remainder to the firſt, *&c.* Son by any other Wife, Remainder over; a Son is born and of Age, the Wife dead, and there are no other Sons by a ſecond Marriage, the Truſt for preſerving contingent Remainders deſcends to an Infant; if for the Benefit of the Family, Equity will decree the Infant Truſtee to join in a Recovery. 536

Truſtee, when and how to be charged and diſcharged, and what Allowance to have.

Two Truſtees in a Mortgage join in an Aſſignment of the Term, and in a Receipt for the Whole, each receiving a Moiety only of the Mortgage Money; to be anſwerable only for what they reſpectively receive. *Page* 81, 241

Otherwiſe where Executors join in Sales, there being no Neceſſity for their ſo doing. 83

Captain of a Ship dies leaving Money on Board, the Mate becomes Captain and improves the Money; he ſhall, on Allowance made to him for his Care of the Management of ſuch Money, account for the Profits, and not for the Intereſt only. 140

Where an Executor puts out Money, though without the Indemnity of a Decree, upon a real Security, which there was no Reaſon then to ſuſpect; but afterwards ſuch Security proves bad, he is not accountable for the Loſs, any more than he would have been entitled to the Profit, had it continued good. 141

10,000 *l.* Truſt Money being agreed to be laid out in Land and ſettled in the common Form of Marriage Settlements, is employed in buying *South-Sea* Stock, and improved to 30,000 *l.*; as the Truſt would have ſuffered by the Fall, ſo ſhall it have the Benefit of the Riſe of the Stock. 648

Valuation.

WHERE a Covenant was to ſettle Lands, (without mentioning any Lands in certain) this no ſpecific Lien, but the Wife decreed to come in as a Creditor in general, and to be entitled to what the Maſter ſhould value her Eſtate for Life at, but ſhe to have the Arrears before incurred, as well as the Valuation of her Eſtate for Life. *Page* 429

Tenant for Life, Remainder to the firſt Son in Tail, Remainder to the Father in Fee; Father's Intereſt valued but at one Third, and the Eſtate-tail of the Son (tho' an Infant) at two Thirds. 650

Venire Facias. See under Tit. **Writs.**

Verdict. See **Trial.**

Voluntary. See alſo **Fraud.**

A voluntary Conveyance to the Brother of the Half Blood, but which was void and defective at Law, made good by a Court of Equity againſt the Heir. 60

Vide autem, Where it is ſaid a voluntary Conveyance of a Copyhold, or other Eſtate, is not to be helped in Equity againſt the Heir. 354

A Freeman of *London* ſigns a Note, by which he owns himſelf indebted in 5000 *l.* to his Brother and Heir, but the Brother knows nothing of it; the Freeman keeps this Note always in his own Cuſtody, and on his Death it is found among his Papers; adjudged a void Note, and as a Matter intended and not perfected. *Page* 204

Truſtees to preſerve contingent Remainders in a voluntary Settlement decreed to join in a Sale for Payment of Debts. 358

A. makes a voluntary Settlement on her Nephew, keeping the Deed in her Power, in which Settlement there is no Power of Revocation; afterwards one ſecretly and by Fraud, on Behalf of the Nephew, gets an atteſted Copy of this Settlement, and then the Party who made the Settlement burns it, and ſettles the Premiſſes on another Nephew, delivering to him the ſecond Settlement; the firſt Nephew's Bill to eſtabliſh the Copy of the firſt Settlement diſmiſſed with Coſts, and the atteſted Copy ordered to be delivered up to the ſecond Nephew; for tho' of two voluntary Settlements the firſt ſhall take Place, yet this is not ſo where any Fraud has been uſed in gaining the firſt Settlement, or a Copy of it. 577

Or if the firſt was made abſolute againſt the Intention of the Party. 581

Waſte.

LORD of a Manor may bring a Bill for an Account of Oar dug, or Timber cut, by the Defendant's Teſtator; otherwiſe of plowing up Meadow or antient Paſture, or ſuch Torts which die with the Perſon. *Page* 406

Leſſee for Years, *ſans* Waſte, Remainder in Fee to a Biſhop; Leſſee enjoined from digging the Ground for Brick. 527

One in Conſideration of Marriage ſettles an Houſe to the Uſe of himſelf, *ſans* Waſte, Remainder to his firſt, *&c.* Son; the Tenant for Life ſhall not pull down the Houſe. 528

Hard that Leſſee for Years, *ſans* Waſte, ſhould enjoy the Trees or Materials of the Houſe when he pulls it down, the Intention of that Clauſe only being that the Leſſee for Years ſhould be as free from Waſte as he was before the Statute of *Glouceſter.* *ibid.*

Will and Teſtament. See alſo **Expoſition of Words.**

How far parol Proof may be admitted to explain a Will of perſonal Eſtate. See Tit. **Evidence.**

There is a Difference between Wills and Conveyances at Law

Law as to their Conſtruction, and why. *Page* 20

A Will cannot operate as a Releaſe. 85

Though a Will cannot ſpeak or take any Effect until the Teſtator's Death, yet it is inchoate, though not conſummate, from the Execution of it, and to many Purpoſes in Law relates to the Time of the making. 97

Deviſe of a perſonal Eſtate to a Feme Covert for her ſeparate Uſe, without naming Truſtees; *Quære*, whether good to bar the Husband. 125

A Will of Land may be good at Law, as being well executed, and yet ill in Equity, as if obtained by Fraud. 288

One being on Shipboard, and entitled to Part of a conſiderable Leaſehold Eſtate by the Death of his Father, which he did not know he had a Right to, made his Will at Sea, and deviſed to his Mother, if living, his Rings, making *A.* his Executor, to whom he bequeathed his red Box, and *all Things not before bequeathed*; this held not to paſs the Leaſehold Intereſt, or what the Teſtator did not know he was entitled to, but to be reſtrained to Things *ejuſdem generis*. 302

One deviſes the Surplus of his perſonal Eſtate to his Relations; only ſuch ſhall take who are capable of taking within the Statute of Diſtribution. 327

One deviſes the Surplus of his Eſtate to his *poor* Relations, how conſtrued, *& Quære*. *Page* 327

One deviſed the Surplus of his perſonal Eſtate to his Children and Grandchildren; a Grandchild *in Ventre ſa mere* at the Teſtator's Death ſhall not take; *ſecus* had it been to the Children and Grandchildren living at his Death. 342

And ſuch Children and Grandchildren ſhall take *per capita*, not by way of Repreſentation. 343

Deviſe to *A.* and his Heirs, Remainder to *B.* and his Iſſue, Remainder to the Heirs of *A.* *A.* dies without Iſſue in the Life of the Teſtator, *B.* dies in the Life of the Teſtator, leaving Iſſue, who is alſo the Heir of *A.* the Iſſue ſhall not take an Eſtate-tail as Iſſue of *B.* nor the Remainder in Fee as Heir of *A.* 397

Deviſe to *A.* for Life, Remainder to *B.* for Life, Remainder to the right Heirs of *A.* *A.* dies in the Teſtator's Life-time; his right Heirs ſhall never take. 399

Where a real Eſtate is by a Will charged with the Legacies *above mentioned*, this will not extend to the Legacies in the Codicil; *ſecus* if the Lands were charged with the Payment of the Legacies generally. 423

Where a Will was wrote blindly and hardly legible, and the Legacies in Figures, the

Court referred it to a Maſter to examine what thoſe Legacies were, with Directions that he ſhould be aſſiſted by ſuch as underſtood the Art of Writing. *Page* 425

In Caſe of a Will where the Remainder is deviſed in Contingency, the Reverſion in Fee is not in Abeyance in the mean while, but deſcends to the Heir. 516

Where by a Will Money is to be paid by Executors as the Teſtator by Deed ſhall appoint, and the Teſtator afterwards makes a Deed of Appointment; this Deed referring to the Will ſhall be held as Part thereof. 530

Diverſity betwixt a Deviſe of a real Eſtate and the Deviſe of a perſonal Eſtate; as if I deviſe all my real and perſonal Eſtate, and afterwards purchaſe more of each Kind; only the perſonal Eſtate that is purchaſed afterwards ſhall paſs, and why. 575

Probate.

An Executor proves a Will of a perſonal Eſtate wherein one of the Legacies is forged; the Executor has no Remedy in Equity, but ought to have proved the Will, with a ſpecial Reſervation to that Legacy. 388

A Will is made in *French* and the Probate in *Engliſh*, and varies from the Original; the Probate being in a different Language, is not concluſive. *Page* 526

An Executor cannot bring a Bill without ſhewing thereby that he has proved the Will in the Spiritual Court; if he does, this is good Cauſe of Demurrer; but it is enough to alledge that he has duly proved the Will, without ſaying in what Court. 752

If an Executor brings a *Scire facias* to revive a Decree, he muſt ſhew he has proved the Will; and where there are *Bona Notabilia* in divers Dioceſes, if he ſhew Proof of the Will in the Spiritual Court of one of the Ordinaries, this is not good; but in ſuch Caſe the Proof muſt be in the Archbiſhop's Court. 766

Nuncupative Will.

Deviſe by a Nuncupative Will by Tenant in Tail of Rent out of Land to a Charity void, though the Will was made before the Statute of Frauds. 247

Will ſuppreſſed by the Heir. See **Deed.**

Deviſe to a Charity. See under Tit. **Charity.**

Deviſe and Deviſee.

Deviſes of Remainders over of Leaſes, Money, &c. See *Limitations of Terms for Years, Money*, &c. under Tit. *Eſtate for Years.*

A. deviſed Lands to Truſtees and their Heirs, in Truſt that the Profits ſhould be equally divided between his Wife and Daughter (the Heir of the Teſtator) during the Wife's Life, and after her Death he deviſed the ſame to the Uſe of the Daughter in Tail, Remainder over; the Daughter died before the Mother without Iſſue and inteſtate; this held to be a Tenancy in Common between the Mother and Daughter, and that on the Daughter's Death her Moiety did not reſult to the Heir, but was an Intereſt in Nature of a Tenancy *per autre vie*, which by the Statute of Frauds and Perjuries belonged to the Daughter's Adminiſtratrix. *Page* 34

No Eſtate raiſed by Implication in a Will can deſtroy an expreſs Eſtate; as where a Deviſe was to *A.* for Life, Remainder to his firſt Son, and ſo to every other Son in Tail Male, and *for want of Iſſue Male of* A. Remainder over; this gave no Eſtate-tail in *A.* by Implication. 54

One deviſes Lands for the Payment of his Debts, and then to *A.* for Life, with Power to make Leaſes, &c. Remainder to the Heirs Male of the Body of *A.* though this be but the Deviſe of a Truſt and Executory, and expreſſed to be to *A.* for Life, yet it is an Eſtate-tail in *A.* barrable by a Fine and Recovery; *ſecus* had it been the Caſe of Marriage Articles. *Page* 142

See alſo 290

Deviſe to the Teſtator's Wife for Life, and then to be at her Diſpoſal, provided it be to any of his Children; this gives the Wife an Eſtate for Life. 149

One deviſes all his Freehold Houſes in *A.* and has none but Leaſehold Houſes there, the Leaſehold ſhall paſs; *ſecus* in a Grant. 286

Deviſe of Lands to a Corporation in Truſt to convey the Premiſſes to the Teſtator's Godſon *A.* for Life, and ſo to his firſt Son for Life, and afterwards to the firſt Son of that firſt Son for Life, then to *B.* for Life, with the like Limitations; this tending to a Perpetuity will not be allowed, but the Conveyance ſhall be made as near the Intent of the Party as the Rules of Law will admit, *viz.* by making all the Perſons in Being only Tenants for Life, but the Limitation to the Sons unborn muſt be in Tail. 332

Where one deviſes his Lands for the Payment of his Debts, Bond and Simple Contract Debts ſhall be paid equally; but

but if he only charges his Lands with the Payment of his Debts, ſo that they deſcend ſubject to the Debts, the Bonds ſhall be preferred to the Simple Contract Debts. *Page* 430

But if the Heir ſells the Land before Action brought, then both to be paid equally. 431

One deviſes Lands to his Wife for Life, and after her Death to his Son in Fee, upon Condition to pay his Daughter 1000 *l.* within a Year after the Death of *J. S.* with a Proviſo that, if the Money be not paid, the Daughter may enter and receive the Profits till Payment; *J. S.* dies living the Wife; the Daughter ſhall have the 1000 *l.* during the Life of the Mother, and in Default of Payment, Equity will decree a Sale of the Reverſion. 478

One deviſes his Eſtate, in caſe he leaves no Son at the Time of his Death, to *J. S.* the Teſtator dies leaving his Wife *privement enſient* with a Son; this poſthumous Son is a Son living at the Teſtator's Death, and *J. S.* not entitled. 486

One deviſes Lands to his younger Sons at twenty-four, and in the mean Time the Rents and Profits of the Premiſſes to his eldeſt Son, and dies; the eldeſt Son deviſes all thoſe Rents and Profits of the Premiſſes to his younger Brothers, but not to be paid to them until twenty-four; only the Rents and Profits accruing from the Death of the elder Brother ſhall paſs. *Page* 500

So if one poſſeſſed of a Term for Years deviſes all the Profits thereof to *J. S.* only the Profits accruing from the Death of the Teſtator ſhall paſs. 503

Deviſe to *A.* for Life, Remainder to the right Heirs of *J. S.* who is then living; the Fee-ſimple deſcends to the Heir at Law of the Teſtator, till the Contingency happens. 511

By a Deviſe of an Houſe *cum pertinentiis*, only the Garden and Orchard will paſs with it; but by a Deviſe of an Houſe *with the Land appertaining thereto*, the Land uſually occupied therewith will paſs. 603

One deviſed that his Couſin *A.* ſhould continue to live at his Houſe, and be at the Charge of keeping it, and the Servants and Coach-Horſes which the Teſtator employed in plowing the Ground, and ſpend the Corn ariſing thereon in the Houſe; here the Land enjoyed with the Houſe ſhall paſs to the Couſin. *ibid.*

One deviſes an Houſe, and directs by Will, that an Annuity of 1200 *l. per Annum* be paid to his Couſin, and that ſhe ſhall maintain her Son there; the Son chuſes to go from her; ſtill the Couſin ſhall have the 1200 *l. per Annum* in the ſame Manner as if the Son had died. 604

In a Deviſe of Land to *A.* for Life, and if *A.* die without Iſſue, then to *B.* tho' here is an expreſs Eſtate for Life to *A.* yet the ſubſequent Words will turn it into an Eſtate-tail; but where Lands are deviſed to *A.* for Life, Remainder to Truſtees, *&c.* Remainder to his firſt, *&c.* Son in Tail Male, *&c.* and if *A.* dies without Iſſue, then, *&c.* this will not give an Eſtate-tail to *A.* but the Words [without Iſſue] muſt be intended to be without *ſuch* Iſſue. *Page* 605

One deviſes his Eſtate to Truſtees and their Heirs, in Truſt to convey the Premiſſes to his Son for Life, Remainder to his firſt, *&c.* Son in Tail Male ſucceſſively, Remainder to his four Daughters, to each one Fourth in Fee, and in caſe any of the four Daughters die without Iſſue, the Truſtees to convey ſuch fourth Part in Fee to the reſpective Heirs of the Perſon ſo dying; one of the Daughters dies without Iſſue, her Fourth in Equity belongs to her Brother as her Heir. 606

Two Schools in the ſame Town, one a Free School, and the other a Charity School for Boys and Girls; *A.* deviſes 500 *l.* to the Charity School; tho' both be Charity Schools, yet only that for Boys and Girls ſhall take. 674

Revocation.

Subſequent Marriage and having Children conſtrued a Revocation of a Will. *Page* 304

A Will, or Writing revoking a former Will, muſt be ſubſcribed by three Witneſſes, but this need not be in the Preſence of the Teſtator. 343

A void Will or Codicil, tho' there be a Clauſe of revoking all former Wills, will not however operate as a Revocation. 344

Cancelling a former Will by Miſtake, or on a Preſumption that a latter Will is good, which proves void, will not let in the Heir. 345

One makes Duplicates of his Will, and cancels one of the Duplicates; this is a Revocation of the whole Will. 346

Witneſs to a Will.

A Child of a reſiduary Legatee no Witneſs to prove a Will relating to a perſonal Eſtate, by the Civil Law, by which Law only ſuch Will is determinable. 10

One of the Witneſſes to a Will is Deviſee of Part of the Land. *Quære* if not a good Witneſs if he aliens the Land without Covenant or Warranty. 557

A Witneſs proving a Will of Land, ſwears that he ſubſcribed it in the ſame Room, and at the Teſtator's Requeſt; this held good, tho' not ſaid in the Teſtator's Preſence. *Page* 740

A Witneſs to prove a Will of Lands ought properly to prove that the Will was executed in his Preſence, and alſo in the Preſence of the two other Witneſſes, and that they ſubſcribed in the Preſence of the Teſtator. 741

Where there is a Power to appoint an Uſe of Land by Deed or Will, a Will atteſted by two Witneſſes not a good Appointment; becauſe in ſuch Caſe by a *Will* muſt be intended ſuch a Will as is proper to diſpoſe of Land; ſo though the Words are, *or other Writing in nature of a Will.* 741, 742

Witneſs. See alſo **Evidence, Examination and Depoſitions.**

In a Suit to eſtabliſh a former Will, *A.* is examined by the Plaintiff as a Witneſs to prove the ill Practices made uſe of in obtaining a latter Will; after which, and before the Hearing of the Cauſe, *A.* has a Rent-Charge deviſed to him by the Perſon claiming under the former Will; the Depoſition of *A.* who was diſintereſted at the Time of the Examination, but afterwards became intereſted and Plaintiff in the Cauſe, allowed to be read. *Page* 288

The ſurviving Witneſs to a Bond is made Executor of the Obligee; in an Action brought by him on the Bond, Evidence ſhall be admitted to prove the Plaintiff's Hand. 289

A Grantee, where he appears to be a bare Truſtee, good Evidence to prove the Execution of a Deed to himſelf. 290

If a Corporation would make Uſe of one of their own Members as a Witneſs, they muſt disfranchiſe him. 596

A Pariſhioner is no good Witneſs to prove a Charity given to the Pariſh; *ſecus* if only a Lodger, and one who does not pay to the Poor; but to be intended a Houſe-keeper, and to pay, unleſs the contrary be made to appear. 600

A Bankrupt's Wife cannot be examined againſt her Huſband to prove his Bankruptcy, tho' ſhe may by 5 *Geo. cap.* 24. be examined touching the Diſcovery of her Huſband's Effects. 611

Bill to examine Witneſſes in perpetuam rei memoriam.

A Bill lies to perpetuate Teſtimony, *&c.* before Trial, on Affidavit annexed that the Plaintiff's Witneſſes are infirm and unable to travel. 117

Women.

Women incapacitated from being Witneſſes to Wills by the Civil Law. *Page* 11

Words. See **Expoſition of Words.**

Words no Evidence againſt a Deed ſolemnly executed. 482

Writs.

In a Proſecution of the Crown, though ſince the late Statute of 4 & 5 *Ann.* the *Venire facias*, which was awarded *de Vicineto*, and not *de corpore Comitatûs*, was held good on Account of the Number of Precedents. 223

Uſual for the Curſitors to *teſte* Original Writs againſt Hundreds and Corporations, &c. the ſame Day they are beſpoke. 438

Ne exeat Regnum.

A Writ of *Ne exeat Regnum* lies to prevent one's going to *Scotland*; and how the Condition of the Recognizance in ſuch Caſe muſt be worded. *Page* 263

Writs of Error. See **Error.**

Scire facias.

A Bill of Revivor after a Decree to Account, is in Nature of a *Scire facias* on a Judgment, and not within the Statute of Limitations. 742

An Executor bringing a *Scire facias* to revive a Decree, muſt ſhew he has proved the Will; and there being *Bona Notabilia* in divers Dioceſes, if he ſhews Proof of the Will in the Spiritual Court of one of the Ordinaries, this not good, but in ſuch Caſe the Proof muſt be in the Court of the Archbiſhop. 766

Superſedeas.

Writ of Error of a Judgment on a *Mandamus*, ſince 9 *Ann. cap.* 20. no *Superſedeas* to a peremptory *Mandamus*. 351

Where the Writ of *Excommunicato capiendo* has iſſued, and not actually returned into *B. R.* the Court of Chancery, on a plain Error appearing, may ſuperſede it. 436

FINIS.

G. III R
BRITISH MUSEUM